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SUPREME COURT, U.S.

## TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

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No. 5

THE UNITED STATES OF AMERICA, PETITIONER

vs.

HARVEY L. CARIGNAN

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

---

PETITION FOR CERTIORARI FILED FEBRUARY 8, 1951  
CERTIORARI GRANTED MAY 31, 1951

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950.

No. ....

THE UNITED STATES OF AMERICA,  
PETITIONER,

VS.

HARVEY L. CARIGNAN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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omitted in printing.

1 In the District Court for the Territory of  
Alaska

L Third Division

No. 2272 Criminal

Section 65-4-1, A. C. L. A., 1949

UNITED STATES OF AMERICA,  
PLAINTIFF,

VS.

HARVEY L. CARIGNAN,  
DEFENDANT.

*Indictment*

*The Grand Jury Charges:*

That on or about the 31st day of July, 1949, at or near Anchorage, Alaska, Third Judicial Division, Territory of Alaska, Harvey L. Carignan was engaged in an attempt to commit the crime of rape, by forcibly and against her will attempting to carnally know and ravish one Laura A. Showalter, a woman. And the said Harvey L. Carignan, while engaged in the attempt to commit such rape by his acts, killed Laura A. Showalter by beating her about the head and face with his fists.

A true bill:

/s/ JOHN H. HOEKZEMA

Foreman

/s/ RALPH E. MOODY

Asst. United States Attorney

Witnesses examined before the Grand Jury:

Henry A. Keith

Paul Herring

Dr. James O'Malley

Benny Rumsower

Levere Peterson

Sgt. Conrad Sylvester

Virgil Barkdoll

Frank Kellner

Evelyn Cummings

Everette Gillette

No. 2272 Cr

District Court  
Territory of Alaska,  
Third Division

UNITED STATES OF AMERICA  
VS.  
HARVEY L. CARIGNAN

INDICTMENT

Section 65-4-1, A. C. L. A., 1949  
Murder, 1st Degree

A True Bill,  
/s/ JOHN H. HOEKZEMA  
Foreman.

Presented to the Court by the Foreman of the  
Grand Jury in open Court, in the presence of the  
Grand Jury and filed in the District Court, Terri-  
tory of Alaska, Third Division.

M. E. S. BRUNELLE,  
Clerk.

By /s/ LOUISE STRAHORN,  
Deputy.

Oct 12 1949

In District Court

Order Appointing Counsel—Oct. 14, 1949

Now on this day came the defendant Harvey L. Carignan in cause No. 2272 Cr., entitled United States of America, Plaintiff, v. Harvey L. Carignan, defendant, in custody of the United States Marshal and represented to the Court that he was not represented by counsel and owing to indigent circumstances was unable to secure the services of counsel and being asked directly by the Court if he had any money to pay counsel and on his answering in the negative,

It is ORDERED that the names of Bailey E. Bell and James E. Weir be, and are hereby, entered as counsel for defendant herein, and defendant remanded to the custody of the United States Marshal.

ENTERED JOURNAL NO. G-20 PAGE NO. 49  
OCT 14 1949

4

In the District Court

*Order Appointing Counsel—Oct. 15, 1949.*

Now on this day upon the withdrawal of Bailey E. Bell as co-counsel for Harvey L. Carignan in cause No. 2272 Cr., entitled United States of America, Plaintiff versus Harvey L. Carignan, Defendant,

IT IS ORDERED that the name of Harold J. Butcher be, and is hereby, entered as co-counsel for defendant herein.

ENTERED JOURNAL NO. G-20 PAGE NO. 56

OCT 15 1949

5

In the District Court

*Arraignment and Setting Time to Plead—  
Oct. 17, 1949*

Now on this day came Ralph E. Moody, Assistant United States Attorney, for and in behalf of the Government, came also the defendant Harvey L. Carignan in cause No. 2272 Cr., entitled United States of America, plaintiff, v. Harvey L. Carignan defendant, in custody of the United States Marshal and represented by Harold J. Butcher of his counsel; whereupon defendant was brought before the bar of this Court and being asked if he was indicted by his true name and answering that he was the indictment was read to said defendant by the Deputy Clerk of the Court and a copy of said indictment, including a list of the names of the witnesses appearing before the Grand Jury for the purpose of this indictment, was delivered to said defendant.

WHEREUPON, said defendant asking time within which to enter his plea or otherwise move against said indictment, the time therefor is set for 9:30 o'clock A. M. of Monday October 24, 1949, and defendant was remanded to the custody of the United States Marshal.

ENTERED JOURNAL NO. G-20 PAGE NO. 58

OCT 17 1949

6

In the District Court

*Plea of Not Guilty—Oct. 24, 1949*

Now on this 24th day of October, 1949 came Ralph E. Moody, Assistant United States Attorney, came also the defendant Harvey L. Carignan in person, in custody of



the United States Marshal, and represented by Harold J. Butcher, of his counsel and said defendant having heretofore and on the 17th day of October, 1949, been duly arraigned, announced to the Court that he is ready to enter his plea herein is asked by the Court if he is guilty or not guilty of the crime charged against him in the indictment, to-wit: Murder, 1st degree, to which defendant says he is not guilty and therefore puts himself upon the Country, and the Assistant United States Attorney, for and in behalf of the Government, does the same, and defendant was remanded to the custody of the United States Marshal.

ENTERED JOURNAL NO. G-20 PAGE NO. 86  
OCT 24 1949

7 In the District Court for the Territory  
of Alaska  
Third Division  
(Title Omitted)

*Motion to Dismiss—Filed Oct. 24, 1949*

Comes now the defendant in the above entitled cause, and moves that the indictment be dismissed on the following grounds:

I

That the District Court for the District of Alaska, Third Division, has no existence, and is not a court of the Territory of Alaska, and that this Court, therefor, has no jurisdiction over the crime charged in the indictment.

II

That Alaska Compiled Laws Annotated 1949 purporting to contain the Section of the Alaska Law violated by the defendant is not the legal code of Alaska, and the citation, therefor, does not inform the defendant of the charge.

/s/ HAROLD J. BUTCHER  
*Attorney for Defendant*

Receipt of Copy Acknowledged  
this 24th day of October, 1949.

/s/ RALPH E. MOODY

Asst. United States Attorney  
(File Endorsement Omitted)

8

In the District Court for the Territory  
of Alaska

Third Division—Anchorage Precinct

(Title Omitted)

(File Endorsement Omitted)

*Notice of Motion to Transfer—Nov. 17, 1949*

To: *United States Attorney*  
J. Earl Cooper

This is to notify you that on the 18th day of November, 1949, at the hour of 10:00 a. m., or as soon thereafter as counsel can be heard, defendant will move the Court for a transfer of proceedings in the case of United States of America vs. Harvey L. Carignan, Criminal No. 2272, on the grounds set forth in the Motion and Affidavits attached thereto.

/s/ HAROLD J. BUTCHER

Harold J. Butcher

*Attorney for the Defendant*

Receipt of copy acknowledged  
this 17 day of November, 1949.

J. EARL COOPER,

United States Attorney

by /s/ D. M. PRICE

9

In the District Court for the Territory  
of Alaska

Third Division—Anchorage Precinct

(Title Omitted)

(File Endorsement Omitted.)

*Motion for Change of Venue*

Comes now Harold J. Butcher, of counsel for the above named defendant, and moves this Honorable Court for a change of venue in the case of United States of America vs. Harvey L. Carignan, Criminal No. 2272, on the grounds that in order to insure a fair trial for the defendant in the above entitled cause, the trial should be heard in a Court removed from Anchorage and the Anchorage area, for the reason that due to the extreme fear and the shocking details of the alleged crime existing in this community on the

occasion of the crime and the subsequent activities of the defendant and officers of the law, and the highly sensational and inflammatory nature of the newspaper reports appearing almost daily in the local newspapers; as supported by the attached affidavits and clippings from said newspapers; it would be impossible to choose a jury free from emotionalism, prejudice, and/or fear against the defendant. This motion is based on the attached affidavits and newspaper clippings, and other papers filed herein.

Dated this 17th day of November, 1949.

10

/s/ HAROLD J. BUTCHER

Harold J. Butcher

/s/ JAMES WEIR

James Weir

By HAROLD J. BUTCHER  
*Attorneys for Defendant*

Receipt acknowledged of above Motion:

November 17, 1949.

J. EARL COOPER,

U. S. Atty by /s/ D. M. PRICE.

11

In the District Court for the Territory  
of Alaska

Third Division—Anchorage Precinct

(Title Omitted)

*Affidavit in Support of Motion of Transfer Proceedings*

I, RAYMOND M. WILSON, being first duly sworn and upon my oath depose and say:

That I am engaged in the Realty business or employed by Myself and that I have been a resident of the Anchorage area for 4½ years.

That I recall the murder of Mrs. Laura Showalter on the 31st day of July, 1949, and also recall the highly sensational

type of reports that appeared in the Anchorage newspapers which were also broadcast over the Anchorage radio stations; and affiant knows that as result of the shocking nature of the crime and the fear engendered by the sordid details of such crime and the circumstances connected therewith, that the residents of this area and particularly women and girls were so fearful as to avoid being alone at night or walking on the streets of Anchorage after dark alone. Affiant also recalls that at the time of the apprehension of the defendant and the headlines appearing in the 12 newspapers as to his purported confession and the other circumstances surrounding his apprehension and confession that it would be impossible to select from the residents of this area persons for jury duty who had not been affected in some way adversely to the defendant by the crime and details spread before the public and that defendant could not, therefore, have a fair and impartial trial in the District Court at Anchorage.

This affidavit is made in support of defendant's motion for a transfer of proceedings to another Division in the Territory or to another District within the Third Division where there exists no prejudice against the defendant.

/s/ RAYMOND M. WILSON

Subscribed and sworn to before me this 18 day of November, 1949.

JAMES E. WEIR

*Notary Public for the Territory  
of Alaska.*

(SEAL)

My commission expires 10/21/52

13 In the District Court for the Territory of Alaska  
Third Division—Anchorage Precinct  
(Title Omitted)

*Affidavit in Support of Motion of Transfer  
Proceedings*

I, SELWYN P. NOCK, being first duly sworn and upon my oath depose and say:

That I am engaged in the Insurance business or employed by \_\_\_\_\_ and that I have been a resident of the Anchorage area for 7 years.



That I recall the murder of Mrs. Laura Showalter on the 31st day of July, 1949, and also recall the highly sensational type of reports that appeared in the Anchorage newspapers which were also broadcast over the Anchorage radio stations; and affiant knows that as a result of the shocking nature of the crime and the fear engendered by the sordid details of such crime and the circumstances connected therewith, that the residents of this area and particularly women and girls were so fearful as to avoid being alone at night or walking on the streets of Anchorage after dark alone. Affiant also recalls that at the time of the apprehension of the defendant and the headlines appearing in the newspapers as to his  
 14 purported confession and the other circumstances surrounding his apprehension and confession that it would be impossible to select from the residents of this area persons for jury duty who had not been affected in some way adversely to the defendant by the crime and details spread before the public and that defendant could not, therefore, have a fair and impartial trial in the District Court of Anchorage.

This affidavit is made in support of defendant's motion for a transfer of proceedings to another Division in the Territory or to another District within the Third Division where there existed no prejudice against the defendant.

/s/ SELWYN P. NOCK

Subscribed and sworn to before me this 17th day of November, 1949.

/s/ JAMES E. WEIR

Notary Public for the  
Territory of Alaska.

(Seal)

My commission expires 10/21/52

15 In the District Court for the Territory of Alaska  
Third Division—Anchorage Precinct  
(Title Omitted).

*Affidavit in Support of Motion of Transfer  
Proceedings*

I, WARD W. WELLS, JR., being first duly sworn and upon my oath depose and say:

That I am engaged in the wholesale business or employed by \_\_\_\_\_ and that I have been a resident of the Anchorage area for 2 years.

That I recall the murder of Mrs. Laura Showalter on the 31st day of July, 1949, and also recall the highly sensational type of reports that appeared in the Anchorage newspapers which were also broadcast over the Anchorage radio stations; and affiant knows that as a result of the shocking nature of the crime and the fear engendered by the sordid details of such crime and the circumstances connected therewith, that the residents of this area and particularly women and girls were so fearful as to avoid being alone at night or walking on the streets of Anchorage after dark alone. Affiant also recalls that at the time of the apprehension of the defendant and the headlines

16 appearing in the newspapers to his purported confession and the other circumstances surrounding his apprehension and confession that it would be impossible to select from the residents of this area persons for jury duty who had not been affected in some way adversely to the defendant by the crime and details spread before the public and that defendant could not, therefore, have a fair and impartial trial in the District Court at Anchorage.

This affidavit is made in support of defendant's motion for a transfer of proceedings to another Division in the Territory or to another District within the Third Division where there exists no prejudice against the defendant.

/s/ WARD W. WELLS JR.

Subscribed and sworn to before me this 17 day of November, 1949.

JAMES E. WEIR  
Notary Public for the  
Territory of Alaska.

My commission expires 10/21/52

(Seal)

17 In the District Court for the Territory of Alaska  
Third Division—Anchorage Precinct

(Title Omitted)

*Affidavit in Support of Motion of Transfer  
Proceedings*

I. H. J. MCGILL, being first duly sworn and upon my oath depose and say:

That I am engaged in the Manufacture Rep. business or employed by Self-Salesman in Alaska and that I have been a resident of the Anchorage area for 9 years.

That I recall the murder of Mrs. Laura Showalter on the 31st day of July, 1949; and also recall the highly sensational type of reports that appeared in the Anchorage newspapers which were also broadcast over the Anchorage radio stations; and affiant knows that as result of the shocking nature of the crime and the fear engendered by the sordid details of such crime and the circumstances connected therewith, that the residents of this area and particularly women and girls were so fearful as to avoid being alone at night or walking on the streets of Anchorage after dark alone. Affiant also recalls that at the time of the apprehension of the defendant and the headlines

18 appearing in the newspapers as to his Purported confession and the other circumstances surrounding his apprehension and confession that it would be impossible to select from the residents of this area persons for jury duty who had not been affected in some way adversely to the defendant by the crime and details spread before the public and that defendant could not, therefore, have a fair and impartial trial in the District Court at Anchorage.

This affidavit is made in support of defendant's motion for a transfer of proceedings to another Division in the Territory or to another District within the Third Division where there exists no prejudice against the defendant.

/s/ H. J. MCGILL

Subscribed and sworn to before me this 17 day of November, 1949.

/s/ JAMES E. WEIR

Notary Public for the  
Territory of Alaska.

(Seal)

My commission expires 10/21/52

19 In the District Court for the Territory of Alaska  
Third Division—Anchorage Precinct

(Title Omitted)

*Affidavit in Support of Motion of Transfer Proceedings*

I, HENRY C. SHEDD, being first duly sworn and upon my oath depose and say:

That I am engaged in the Hardware business or employed by Self-Hanks Hardware and that I have been a resident of the Anchorage area for 1941-3/9/48 & 49 years.

That I recall the murder of Mrs. Laura Showalter on the 31st day of July, 1949, and also recall the highly sensational type of reports that appeared in the Anchorage newspapers which were also broadcast over the Anchorage radio stations; and affiant knows that as result of the shocking nature of the crime and the fear engendered by the sordid details of such crime and the circumstances connected therewith, that the residents of this area and particularly women and girls were so fearful as to avoid being alone at night or walking on the streets of Anchorage after dark alone. Affiant also recalls that at the time of the

20 apprehension of the defendant and the headlines appearing in the newspapers as to his reported confession and the other circumstances surrounding his apprehension and confession that it would be impossible to select from the residents of this area persons for jury duty who had not been affected in some way adversely to the defendant by the crime and details spread before the public and that defendant could not therefore, have a fair and impartial trial in the District Court at Anchorage.

This affidavit is made in support of defendant's motion for a transfer of proceedings to another Division in the Territory or to another District within the Third Division where there exists no prejudice against the defendant.

/s/ HENRY C. SHEDD

Subscribed and sworn to before me this 17 day of November, 1949.

/s/ JAMES E. WEIR  
Notary Public for the  
Territory of Alaska.

(Seal)

My commission expires 10/21/52



21. In the District Court for the Territory of Alaska  
Third Division—Anchorage Precinct

(Title Omitted)

*Affidavit in Support of Motion of Transfer Proceedings*

I, W. E. THOMPSON, being first duly sworn and upon my oath depose and say:

That I am engaged in the Petroleum business or employed by Union Oil Co. and that I have been a resident of the Anchorage area for 3 years.

That I recall the murder of Mrs. Laura Showalter on the 31st day of July, 1949, and also recall the highly sensational type of reports that appeared in the Anchorage newspapers which were also broadcast over the Anchorage radio stations; and affiant knows that as result of the shocking nature of the crime and the fear engendered by the sordid details of such crime and the circumstances connected therewith, that the residents of this area and particularly women and girls were so fearful as to avoid being alone at night or walking on the streets of Anchorage after dark alone.

Affiant also recalls that at the time of the apprehension of the defendant and the headlines appearing in the newspapers as to his purported confession and the other circumstances surrounding his apprehension and confession that it would be impossible to select from the residents of this area persons for jury duty who had not been affected in some way adversely to the defendant by the crime and details spread before the public and that defendant could not, therefore, have a fair and impartial trial in the District Court at Anchorage.

This affidavit is made in support of defendant's motion for a transfer of proceedings to another Division in the Territory or to another District within the Third Division where there exists no prejudice against the defendant.

/s/ W. E. THOMPSON

Subscribed and sworn to before me this 16 day of November, 1949.

/s/ JAMES E. WEIR

*Notary Public for the  
Territory of Alaska.*

(Seal)

My commission expires 10/21/52

23 In the District Court for the Territory of Alaska  
Third Division—Anchorage Precinct

(Title Omitted)

*Affidavit in Support of Motion of Transfer Proceedings*

I, SYLVESTER J. FLIA, being first duly sworn and upon my oath depose and say:

That I am engaged in the Furniture business or employed by \_\_\_\_\_ and that I have been a resident of the Anchorage area for 5 years.

That I recall the murder of Mrs. Laura Showalter on the 31st day of July, 1949, and also recall the highly sensational type of reports that appeared in the Anchorage newspapers which were also broadcast over the Anchorage radio stations; and affiant knows that as result of the shocking nature of the crime and the fear engendered by the sordid details of such crime and the circumstances connected therewith, that the residents of this area and particularly women and girls were so fearful as to avoid being alone at night or walking on the streets of Anchorage after dark alone.

Affiant also recalls that at the time of the apprehension of the defendant and the headlines appearing in the  
24 newspapers as to his purported confession and the other circumstances surrounding his apprehension and confession that it would be impossible to select from the residents of this area persons for jury duty who had not been affected in some way adversely to the defendant by the crime and details spread before the public and that defendant could not, therefore, have a fair and impartial trial in the District Court at Anchorage.

This affidavit is made in support of defendant's motion for a transfer of proceedings to another Division in the Territory or to another District within the Third Division where there exists no prejudice against the defendant.

/s/ SYLVESTER J. FLIA

Subscribed and sworn to before me this 17 day of November, 1949.

JAMES E. WEIR

Notary Public for the  
Territory of Alaska.

(Seal)

My commission expires 10/21/52

25

## In District Court

*Hearing on Motion for Change of Venue—Dec. 6, 1949*

Now at this time hearing on motion for change of venue in cause No. 2272 Cr., entitled United States of America, Plaintiff versus Harvey L. Carignan, Defendant, came on regularly before the Court, J. Earl Cooper, United States Attorney, appearing for and in behalf of the Government, Harold J. Butcher and James E. Weir, appearing for and in behalf of the defendant. The following proceedings were had to-wit:

Argument to the Court was had by Harold J. Butcher, for and in behalf of the Defendant.

Court takes matter under advisement.

ENTERED JOURNAL NO. G-20 PAGE NO. 2272

DEC. 6, 1949

26

## In District Court

*Order Denying Motion for Change of Venue—Dec. 12, 1949*

Now at this time upon motion of Harold J. Butcher, of counsel for defendant, for renewal of motion in cause No. 2272 Cr. entitled United States of America, Plaintiff versus Harvey L. Carignan, Defendant, of change of venue;

It is ORDERED that motion be and it is hereby denied without prejudice.

ENTERED JOURNAL NO. G-20 PAGE NO. 251

DEC. 12, 1949

27 In the District Court for the Territory of Alaska

Third Division

Anchorage Precinct

(Title Omitted)

*Affidavit for Subpoenas*

United States of America }  
Territory of Alaska } ss:

HARVEY L. CARIGNAN, being first duly sworn and on oath deposes and says:

That he is the defendant in Criminal No. 2272 now being tried before the District Court for the Third Division at Anchorage, Alaska, and that he is represented by counsel *in forma paupris*, and has no funds wherewith to procure

witnesses for his defense, and he therefore prays this honorable court to cause subpoenas to be issued for the following persons, all military personnel, and members of Headquarters Company, residing at Fort Richardson:

Mitchell Murray	3190	Hq. & Hq. Co. U. S. Army
Phillip Bond	3190	" " " " " "
Glenn Evans	3190	" " " " " "
Christopher Kisel	3190	" " " " " "
George Weston		867th AAA
Joseph Rentas	3190	

28. These individuals will be called upon to testify on behalf of the defendant, and specifically as to his activities as they observed them on the 31st day of July, 1949; and affiant states that their testimony is necessary to his defense.

And further affiant sayeth naught.

/s/ HARVEY L. CARIGNAN  
Harvey L. Carignan

SUBSCRIBED and sworn to before me this 13th day of December, 1949.

/s/ HAROLD J. BUTCHER  
*Notary Public in and for Alaska.*  
My commission expires April 21, 1953.

29

In the District Court

*Minute Entries of Trial by Jury*

Now on this 12th day of December, 1949, came J. Earl Cooper, United States Attorney, and Ralph E. Moody, Assistant United States Attorney appearing pro and in behalf of the Government came the defendant in custody of the United States Marshal and with his counsel Harold J. Butcher and James E. Weir, and both sides announcing themselves as ready for trial in cause No. 2272 Cr., entitled United States of America, Plaintiff versus Harvey L. Carignan, Defendant, the following proceedings were had, to-wit:

The deputy Clerk, under the direction of the Court, proceeded to draw from the Trial Jury Box, one at a time, the names of the members of the regular panel of Petit Jurors and respective counsel examined and exercised their challenges against said Jurors, so drawn.



At 11:50 o'clock A. M. Court duly admonished Jurors in Box, remanded defendant to custody of United States Marshal, and continued cause until 2:00 o'clock P. M.

ENTERED JOURNAL No. G-20 PAGE No. 251

DEC. 12, 1949

30 No. 2272 Cr.

TRIAL BY JURY CONTINUED

Now came the Jurors in Box, who on being called, each answered to his or her name, came the defendant in custody of the United States Marshal, came also the respective counsel as heretofore and the trial of cause No. 2272 Cr., entitled United States of America, Plaintiff versus Harvey L. Carignan, Defendant, was resumed.

Whereupon the Deputy Clerk, under the direction of the Court continued to draw from the Trial Jury Box, one at a time, the names of the members of the regular Panel of Petit Jurors and respective counsel examined and exercised their challenges against said Jurors, so drawn, until both sides were satisfied and the Jury complete, consisting of the following named persons, to-wit:

- |                      |                       |
|----------------------|-----------------------|
| 1. Andrew E. Dennis  | 7. Arthur E. Ashley   |
| 2. Bonnie Martin     | 8. Frank J. Riley     |
| 3. Robert Claypool   | 9. Francis J. O'Neill |
| 4. Paul H. Nelms     | 10. Tom Kovac         |
| 5. George F. Mumford | 11. Mary Ethel Price  |
| 6. George A. Boire   | 12. Jean Wright       |

Upon stipulation of respective counsel two alternate Jurors were drawn to-wit:

- |                  |                           |
|------------------|---------------------------|
| 1. S. E. Shirkey | 2. Herbert C. Lindersmith |
|------------------|---------------------------|

which said Jury was duly sworn by the Deputy Clerk to well and truly try the matters at issue in the above-entitled cause and a true verdict render in accordance with the evidence and the instructions given by the Court.

At this time the Court excused the members of the regular panel of Petit Jurors, not engaged in the trial of this cause, to report at 10:00 A. M. O'clock of Wednesday, December 14, 1949.

At this time upon motion of Harold J. Butcher, of counsel for defendant, Jury was excused pending arguments on points of law.

Harold J. Butcher, of counsel for defendant, renewed motion for change of venue.

Argument to the Court was had by Harold J. Butcher for and in behalf of the Defendant.

Whereupon the Court having heard the argument of counsel and being fully and duly advised in the premises, denied motion.

At 3:25 o'clock P. M. Court duly admonished Trial Jury, remanded defendant to custody of United States Marshal, and continued cause until 3:25 o'clock P. M.

ENTERED JOURNAL No. G 20 PAGE No. 251  
DEC. 12, 1949

32 No. 2272 Cr.

TRIAL BY JURY CONTINUED

Now came the Trial Jury, who on being called, each answered to his or her name, came the defendant in custody of the United States Marshal, came also the respective counsel as heretofore and the trial of cause No. 2272 Cr., entitled United States of America, Plaintiff versus Harvey L. Carignan, Defendant, was resumed.

Opening statement to the Jury was had by J. Earl Cooper, for and in behalf of the Government.

Opening statement to the Jury was had by Harold J. Butcher, for and in behalf of the Defendant.

HENRY A. KEITH, being first duly sworn, testified for and in behalf of the Government.

A photo of subject scene was duly offered, marked and admitted as Plaintiff's Exhibit 1.

HARRY SCHWARTZ, was first duly sworn, testified for and in behalf of the Government.

A photo of nude woman was duly offered, marked and admitted as Plaintiff's Exhibit 2.

Man's Knox hat was offered, marked and admitted as Plaintiffs' Exhibit 3.

At 4:42 o'clock P. M. Court duly admonished Trial Jury, remanded Defendant to custody of United States Marshal, and continued cause until 4:48 o'clock P. M.

ENTERED JOURNAL No. G-20 PAGE No. 252.  
DEC. 12, 1949

33 No. 2272 Cr.

TRIAL BY JURY CONTINUED

Now came the Trial Jury, who on being called, each answered to his or her name, came the defendant in custody of the United States Marshal, came also the respective counsel as heretofore and the trial of cause No. 2272

Cr., entitled United States of America, Plaintiff versus Harvey L. Carignan, Defendant, was resumed.

CHARLES H. STOWELL, being first duly sworn, testified for and in behalf of the Government.

A paper-wrapped tablet was duly offered, marked and admitted as Plaintiff's Exhibit 4.

A woman's red shoe, right, was duly offered, marked and admitted as Plaintiff's Exhibit 5.

At 5:08 o'clock P. M. Court duly admonished Trial Jury, remanded defendant to custody of United States Marshal and continued cause until 10:00 o'clock A. M. of Tuesday, December 13, 1949.

ENTERED JOURNAL NO. G-20 PAGE NO. 252

DEC. 12, 1949

34 No. 2272 Cr.

TRIAL BY JURY CONTINUED

Now came the Trial Jury, who on being called, each answered to his or her name, came the defendant in custody of the United States Marshal, came also the respective counsel as heretofore and the trial of cause No. 2272 Cr., entitled United States of America, Plaintiff versus Harvey L. Carignan, Defendant, was resumed.

JOE KLOUDA being first duly sworn testified for and in behalf of the Government.

WILLIAM WILSON being first duly sworn, testified for and in behalf of the Government.

A pair of gold-rimmed bifocal, eye glasses was duly offered, marked and admitted as Plaintiff's Exhibit 6.

MARY FAE REDDICK, being first duly sworn, testified for and in behalf of the Government.

Group picture was duly offered, marked and admitted as Plaintiff's Exhibit 7.

VIRGIL BARKDOLL, being first duly sworn, testified for and in behalf of the Government.

At 11:32 o'clock A. M. Court duly admonished Trial Jury, remanded Defendant to custody of United States Marshal, and continued cause to 11:37 o'clock A. M.

ENTERED JOURNAL NO. G-20 PAGE NO. 252

DEC. 13, 1949

35 No. 2272 Cr.

## TRIAL BY JURY CONTINUED

Now came the Trial Jury, who on being called, each answered to his or her name, came the defendant in custody of the United States Marshal, came also the respective counsel as heretofore and the trial of cause No. 2272 Cr., entitled United States of America, Plaintiff versus Harvey L. Carignan, Defendant, was resumed.

T. H. MILLER being first duly sworn, testified for and in behalf of the Government.

At 11:55 o'clock A. M. Court duly admonished Trial Jury, remanded defendant to custody of U. S. Marshal, and continued cause until 2:00 o'clock P. M.

ENTERED JOURNAL No. G-20 PAGE No. 253

DEC. 13, 1949

360 No. 2272 Cr.

## TRIAL BY JURY CONTINUED

Now came the Trial Jury, who on being called, each answered to his or her name, came the defendant in custody of the United States Marshal, came also the respective counsel as heretofore and the trial of cause No. 2272 Cr., entitled United States of America, Plaintiff versus Harvey L. Carignan, Defendant, was resumed.

GEORGE O. PETERSEN, being first duly sworn, testified for and in behalf of the Government.

T. F. MOORE being first duly sworn, testified for and in behalf of the Government.

Photo of body, torso, partially clad, was duly marked, offered and admitted as Plaintiff's Exhibit 8.

Photo of body, partially clad, was duly offered, marked and admitted as Plaintiff's Exhibit 9.

FRANK J. KELLNER, being first duly sworn, testified for and in behalf of the Government.

Photo of 4 men, was duly offered, marked and admitted as Plaintiff's Exhibit 10.

JAMES E. MILLER, being first duly sworn, testified for and in behalf of the Government.

At 3:20 o'clock P. M. Court duly admonished Trial Jury, remanded Defendant to custody of U. S. Marshal and continued cause until 3:30 o'clock P. M.

ENTERED JOURNAL No. G-20 PAGE No. 253

DEC. 13, 1949



37 No. 2272 Cr.

TRIAL BY JURY CONTINUED

Now came the Trial Jury, who on being called, each answered to his or her name, came the defendant in custody of the United States Marshal, came also the respective counsel as heretofore and the trial of cause No. 2272 Cr., entitled United States of America, Plaintiff versus Harvey L. Carignan, Defendant, was resumed.

A pair of man's brown pants was duly offered, marked and admitted as Plaintiff's Exhibit 11.

WALLACE MARTENS, first duly sworn, testified for and in behalf of the Government.

A pink slip O. K. Cleaners, dated 9-23-49, to "Miller" was duly offered, marked and admitted as Plaintiff's Exhibit 12.

A pink slip, O. K. Cleaners, dated 8/2/1949, to "Carignan" was duly offered, marked and admitted as Plaintiff's Exhibit 13.

PAUL HERRING, being first duly sworn, testified for and in behalf of the Government.

Statement, 9/19/49, of 5 pages, on yellow paper, signed by Harvey L. Carignan, was duly offered, marked and admitted as Plaintiff's Exhibit 14.

At 5:05 o'clock Court duly admonished Trial Jury and continued cause until 10:00 o'clock A. M. of Wednesday, December 14, 1949, and remanded defendant to custody of U. S. Marshal.

ENTERED JOURNAL NO. G-20 PAGE NO. 253

DEC. 13, 1949

38 No. 2272 Cr.

TRIAL BY JURY CONTINUED

Now came the Trial Jury, who on being called, each answered to his or her name; came the defendant in custody of the United States Marshal, came also the respective counsel as heretofore and the trial of cause No. 2272 Cr., entitled United States of America, Plaintiff versus Harvey L. Carignan, Defendant, was resumed.

At this time Harold J. Butcher, of counsel for defendant, files with the Court an affidavit *in re*—subpoenas for witnesses for defendant at Government expense.

Argument to the Court was had by J. Earl Cooper, United States Attorney, for and in behalf of the Government.

Argument to the Court was had by Harold J. Butcher, for and in behalf of the Defendant.

Whereupon the Court having heard the arguments of respective counsels and being fully and duly advised in the premises, denied motion without prejudice.

PAUL HERBING, heretofore duly sworn, resumed witness stand for further cross examination for and in behalf of the defendant.

An Affidavit, dated 11/25/49 signed by James E. O'Malley, was duly offered, marked and admitted as Plaintiff's Exhibit 15.

Government Rests.

At 10:45 o'clock Court duly admonished Trial Jury and remanded defendant to custody of United States Marshal, and continued cause to 10:50 o'clock A. M.

ENTERED JOURNAL NO. G-20 PAGE NO. 257

DEC. 14, 1949

39 No. 2272 Cr.

TRIAL BY JURY CONTINUED

Now came the Trial Jury, who on being called, each answered to his or her name, came the defendant in custody of the United States Marshal, came also the respective counsel as heretofore and the trial of cause No. 2272 Cr., entitled United States of America, Plaintiff versus Harvey L. Carignan, Defendant, was resumed.

At this time Harold J. Butcher, of counsel for defendant, moves Court that Jury be excused pending arguments on points of law.

Harold J. Butcher, for and in behalf of the defendant, moves Court for judgment of acquittal on grounds that Government has failed to sustain allegations of indictment.

Argument to the Court was had by Butcher, Harold J. For and in behalf of the Defendant.

Motion denied.

GLENN E. EVANS, being first duly sworn, testified for and in behalf of the Defendant.

BRAD W. THURMAN, being first duly sworn, testified for and in behalf of the Defendant.

At 11:40 o'clock A. M. Court duly admonished Trial Jury, remanded Defendant to custody of United States Marshal and continued cause until 2:00 o'clock P. M.

ENTERED JOURNAL NO. G-20 PAGE NO. 257

DEC. 14 1949

40 No. 2272 Cr.

TRIAL BY JURY CONTINUED

Now came the Trial Jury, who on being called, each answered to his or her name, came the defendant in custody of the United States Marshal, came also the respective counsel as heretofore and the trial of cause No. 2272 Cr., entitled United States of America, Plaintiff versus Harvey L. Carignan, Defendant, was resumed.

Defendant Rests.

RALPH WOFFORD, being first duly sworn, testified for and in behalf of the Government.

J. Earl Cooper, United States Attorney, moves Court for permission to re-open case in Chief for purpose of offering certain documents unto evidence, motion granted.

A certified copy of a Standard Certificate of Death, Territory of Alaska, No. 1114, issued on Laura Irene Showalter, recorded August 5, 1949, was duly offered, marked and admitted as Plaintiff's Exhibit 16.

FRANCIS E. GARNER, being first duly affirmed, testified for and in behalf of the Government.

Government Rests.

Opening argument to the Jury was had by J. Earl Cooper, United States Attorney, for and in behalf of the Government.

Argument to the Jury was had by James E. Weir for and in behalf of the Defendant.

Argument to the Jury was had by Harold J. Batcher for and in behalf of the Defendants.

At 3:35 o'clock P. M. Court duly admonished Trial  
41 Jury, remanded Defendant to custody of United States Marshal, and continued cause until 3:45 o'clock P. M.

ENTERED JOURNAL NO. G-20 PAGE NO. 257

DEC. 14 1949

42 No. 2272 Cr.

TRIAL BY JURY CONTINUED

Now came the Trial Jury, who on being called, each answered to his or her name, came the defendant in custody of the United States Marshal, came also the respective counsel as heretofore and the trial of cause No. 2272 Cr., entitled United States of America, Plaintiff versus Harvey L. Carignan, Defendant, was resumed.

Closing argument to the Jury was had by J. Earl Cooper, United States Attorney, for and in behalf of the Government.

Court reads instructions to Jury:

Whereupon David Drew and Verne Robinson were duly sworn by the Deputy Clerk as bailiffs in charge of said Jurors, and upon stipulation by and between respective counsel the Court directed that a sealed verdict be returned in this cause and at 4:34 o'clock P. M. the Trial Jury retired in charge of their sworn bailiffs, and Defendant was remanded to custody of United States Marshal.

ENTERED JOURNAL NO. G-20 PAGE NO. 258

DEC. 14 1949

43 In the District Court for the Territory of Alaska  
Division Number Three at Anchorage

(Title Omitted)

*Court's Instructions to the Jury*

44

No. 1

The indictment charges the defendant with murder in the first degree alleged to have been committed on or about July 31, 1949, at Anchorage, Alaska, by killing Laura A. Showalter in an attempt to rape her.

45

No. 2

That part of the definition of murder in the first degree which is applicable to this case is as follows:

"Whoever, being of sound memory and discretion purposely and \* \* \* in attempting to perpetrate rape, kill another is guilty of murder in the first degree and shall suffer death."

But the law further provides that the jury may qualify their verdict by adding thereto the words "without capital punishment", in which event the person convicted shall be imprisoned for life.

Rape is defined as follows:

"Whoever has carnal knowledge of a female person forcibly and against her will, is guilty of rape".

Carnal knowledge, as used in the foregoing definition, means sexual intercourse.

As used in the quoted definition of the crime of murder, purposely means intentionally and sound memory and discretion mean sanity.

Where a person attempts to commit a crime and in such attempt does any act toward the commission of such crime but fails or is prevented or intercepted in the perpetration



thereof, he is guilty of an attempt to commit such crime; but where the intended crime is rape and death results in the attempt to commit rape, the perpetrator is guilty of murder in the first degree.

46

## No. 3

The essential elements of the crime charged in the indictment are:

- (1) That the defendant being then and there of sound memory and discretion, killed Laura A. Showalter at the time and place charged in the Indictment.
- (2) Purposely, and,
- (3) In attempting to rape her.

But in this connection, you are instructed that every person is presumed to be of sound memory and discretion and to intend the natural and probable consequences of his voluntary acts, and these presumptions must be given effect by you until the contrary is shown or until, upon a consideration of all the evidence or lack thereof, you have a reasonable doubt as to the defendant's sanity or intent. The purpose or intent to kill may, therefore, be inferred from the acts of the defendant and the surrounding circumstances.

Each of the other essential elements must be proved by the prosecution beyond a reasonable doubt before you can find the defendant guilty.

47

## No. 4

Therefore, if you find from the evidence beyond a reasonable doubt that on or about July 31, 1949 at Anchorage, Alaska, the defendant intended to rape Laura A. Showalter and, in pursuance of such intent, committed any act toward the commission of the crime of rape, but failed or was prevented or intercepted in the perpetration thereof, and further find from the evidence beyond a reasonable doubt that in such attempt he purposely killed said Laura A. Showalter by beating her with his fists, you should find him guilty as charged. On the other hand, if you do not so find or have a reasonable doubt thereof, you should acquit him.

48

## No. 5

As you have already been instructed, the law permits the jury to qualify a verdict of murder in the first degree by adding thereto the words: "Without Capital Punishment", in which event the sentence is life imprisonment.

ment, but if a verdict is not so qualified, the penalty is death. Whether, in this case, you qualify or do not qualify your verdict, is a matter on which the Court has nothing to say, it being exclusively your discretion. However, before you may return an unqualified verdict, a form for which is attached to these instructions and designated "Verdict No. 1", you must unanimously agree on both guilt and punishment. If however, although you unanimously agree on guilt but cannot unanimously agree that the death penalty should be inflicted, you should return your verdict on Form

No. 3

49

No. 6

The law presumes every person charged with crime to be innocent and, hence, the defendant is entitled to the benefit of this presumption until it has been overcome by evidence beyond a reasonable doubt. This rule as to the presumption of innocence is a humane provision of the law intended to guard against the conviction of innocent persons, but it is not intended to prevent the conviction of any person who is in fact guilty or to aid the guilty to escape punishment. Hence, it follows that the defendant does not have to prove his innocence, and that the burden of proving his guilt is upon the prosecution.

50

No. 7

Many attempts have been made to define the term reasonable doubt, but it is doubtful whether they are any clearer than the words themselves. A reasonable doubt may, however, be defined as one arising from a consideration of all the evidence or lack thereof. It is not just any vague, speculative or imaginary doubt which may occur to you, nor a mere excuse that you may conjure up without foundation or out of sympathy for the accused, nor does it mean the bare possibility of innocence. It is a doubt based on reason and one which is reasonable in view of all the evidence or lack thereof. It is an actual, substantial and real doubt. If after an impartial comparison and consideration of all the evidence, or lack thereof, you can truthfully say that you are not satisfied of defendant's guilt, you have a reasonable doubt; but if you can truthfully say that you have a settled conviction of the defendant's guilt, such as you would be willing to act upon, if you were under no compulsion to act, in the more important affairs of your own life, then you have no reasonable doubt.

51

## No. 8

Drunkenness is no excuse for crime, but evidence of drunkenness may be considered on the question of intent. If you find that the defendant committed an assault on Laura A. Showalter, you may consider the evidence of drunkenness, if any, in determining whether he was capable of forming the intent to rape, which is an element of the crime charged.

52

## No. 9:

Subject to the law as contained in these instructions, you are also the sole and exclusive judges of the credibility of the witnesses and of the effect and value of the evidence.

You are, however, instructed that your power of judging the effect of evidence is not arbitrary but is to be exercised by you with legal discretion and in subordination to the rules of evidence; that the oral admissions of a party should be viewed with caution; that evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict and, therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party offering it, such evidence should be viewed with distrust.

Before reaching a verdict you will carefully consider and compare all the testimony. In determining the credibility of witnesses and the weight to be given their testimony, you should decide what testimony is to be believed in the same way as you do when you are told something out of court. You size up the witness in the same way, observe his appearance and demeanor, note his intelligence, whether he is candid and straight forward or shift and evasive; whether he has an interest in the outcome of the trial, what motive he may have for testifying as he did, the opportunity he had to learn of the facts to which he testified.

53

the probability or improbability of his testimony, his bias or prejudice against or inclination to favor either party, and the extent to which he is corroborated or contradicted and all the other facts and circumstances which shed light on the witness' credibility and the weight of his testimony. In other words, you should bring to bear upon your consideration of the evidence or lack of evidence in this case all of the common

knowledge of men and affairs which you, as reasonable human beings, have and exercise in every day affairs of life. Accordingly, you should draw from the evidence or lack of evidence in this case all deductions which appear to you to flow logically from such evidence or lack of evidence. Whatever verdict is warranted by the evidence under the instructions of the Court, you should return as you have sworn to do.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds. The direct evidence of one witness whom you find to be entitled to full credit is sufficient for the proof of any fact in this case. ★ witness wilfully false in one part of his testimony may be distrusted in other parts. Whenever it is possible you will reconcile conflicting or inconsistent testimony, but where it is not possible to do so, you should give credence to that testimony which, under all the facts and circumstances of the case, appeals to you as the most worthy of belief.

You are also instructed that the opening statements and the arguments of counsel are not evidence, and they are not binding upon you. You may, however, be guided by them if you find that they are based on the admitted evidence and appeal to your reason and judgment, and are not in conflict with the law as set forth in these instructions.

55

### No. 10

Juries are impaneled for the purpose of agreeing upon a verdict if they can conscientiously do so, and the law requires that all twelve jurors must agree upon a verdict before one can be rendered. Hence, while no juror should yield a sincere conviction, founded upon the law and the evidence of the case, merely to agree with other jurors, every juror, in considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict because the law contemplates that the verdict shall be the product of the collective judgment of the entire jury.



Accordingly, no juror should hesitate to change the opinion he has entertained, or expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors. But before a verdict of guilty can be rendered, each of you must be able to say, in answer to your individual conscience, that you have arrived at a settled conviction, based upon the law and the evidence of the case and nothing else, that the defendant is guilty.

56

No. 11

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and you should not single out one particular instruction and consider it by itself, or separately from or to the exclusion of all the other instructions.

As you have been heretofore instructed, your duty is to determine the facts of the case from the evidence submitted, and to apply to these facts the law as given to you by the Court in these instructions. The Court does not, either in these instructions or otherwise, wish to indicate how you shall find the facts or what your verdict shall be, or to influence you in the exercise of your right and duty to determine for yourselves the effect of evidence you have heard or the credibility of witnesses, because the responsibility for the determination of the facts in this case rests upon you and upon you alone.

57

No. 12

Upon retiring to your jury room you will select one of your number foreman, who will speak for you and sign the verdict unanimously agreed upon.

You will take with you to the jury room the indictment, the exhibits and these instructions, together with three forms of verdict, which are self-explanatory.

When you have agreed upon a verdict and your foreman has dated and signed it, you will return it into court in the presence of the entire jury, together with the indictment, the exhibits and these instructions and the unused forms of verdict.

Given at Anchorage, Alaska, this 14 day of December, 1949.

In United States District Court

*Trial by Jury Continued*

Now at 10:00 o'clock A. M. came the Jury, in charge of their sworn bailiffs, who, on being called, each answered to his or her name, came also J. Earl Cooper, United States Attorney, came also the defendant with his counsel, Harold J. Butcher and James E. Weir, and said Jury did present, by and through their Foreman, in open Court, their verdict in cause No. 2272 Cr., entitled United States of America, plaintiff, v. Harvey L. Carignan Defendant, which is in words and figures as follows, to-wit:

59 In the District Court for the Territory of Alaska  
Division Number Three at Anchorage

• No. 2272 Cr.

UNITED STATES OF AMERICA,  
PLAINTIFF,  
VS.  
HARVEY L. CARIGNAN,  
DEFENDANT.

*Verdict No. 1—December 15, 1949*

We, the jury empaneled and sworn in the above entitled cause, find the defendant guilty of murder in the first degree as charged in the Indictment.

Dated at Anchorage, Alaska, this 14 day of December 1949.

/s/ BONNIE L. MARTIN

*Foreman*

(File Endorsement Omitted)

60 which verdict the Court ordered filed and discharged the Jury to remain in the Courtroom for further duty, and remanded the defendant to the custody of the United States Marshal.

ENTERED JOURNAL NO. G-20 PAGE NO. 261

DEC. 15, 1949

61 In the District Court for the Territory of Alaska  
Division Number Three at Anchorage

No. 2272 Cr.

UNITED STATES OF AMERICA,  
PLAINTIFF,  
VS.

HARVEY L. CARIGNAN,  
DEFENDANT.

*Verdict No. II*

— We, the jury empaneled and sworn in the above entitled cause, find the defendant guilty of murder in the first degree as charged in the Indictment, but without capital punishment.

Dated at Anchorage, Alaska, this \_\_\_\_ day of December, 1949.

---

*Foreman*

62 In the District Court for the Territory of Alaska  
Division Number Three at Anchorage

No. 2272 Cr.

UNITED STATES OF AMERICA,  
PLAINTIFF,  
VS.

HARVEY L. CARIGNAN,  
DEFENDANT.

*Verdict No. III*

— We, the jury empaneled and sworn in the above entitled cause, find the defendant not guilty.

Dated at Anchorage, Alaska, this \_\_\_\_ day of December, 1949.

---

*Foreman*

63 In the District Court for the Territory of Alaska  
Third Division  
(Title Omitted)

*Motion for New Trial—Filed Dec. 19, 1949*

The defendant moves the Court to grant him a new trial for the following reasons:

1. That the Court erred in denying the defendant's motion for a transfer of the case to another jurisdiction on the grounds of impossibility to have a fair trial in the Third District Court at Anchorage, Alaska.

2. That the Court erred in denying defendant's motion to dismiss on the grounds that he had not been given a preliminary hearing, and was denied the right of counsel while held in custody during the period up to his arraignment on the indictment.

3. That the verdict is not supported by the evidence.

4. That the Court erred in refusing to permit defendant to take the stand and testify as a preliminary matter on the admissibility of the confession.

5. That the Court erred in denying defendant's motion for judgment of acquittal when the government rested their case on the grounds that the material allegation of the indictment had not been proved.

64 6. That the Court erred in denying the defendant the right to call witnesses to his defense on the basis that he was an indigent defendant and had no means to procure witnesses.

7. That the Court erred in admitting a confession into evidence which was clearly involuntary and was procured by means of secret interrogation, promises, inducements, and psychological pressure on the part of police officers, over a period of several days while the defendant was held in custody and without benefit of counsel.

8. That the Court erred in permitting the witness, Gardner, to take the stand in the government's rebuttal testimony when no direct rebuttal appeared to be possible from the witness who was not present nor with the defendant on the day of the commission of the crime, and the prejudice resulting from the questions of the United States Attorney submitted to certain witnesses, and from the fact that he was permitted to ask leading questions which brought to the attention of the jury other crimes and acts of the defendant



at other times and places having nothing to do with the case at issue.

9. That the Court erred in failing to instruct the jury that no consideration could be taken in the jury's deliberation because of the failure of the defendant to take the stand and testify in his own behalf.

65 10. That the Court failed to allow any time between the furnishing of copies of instructions to jury, and the reading of said instruction to the jury, for review by defendant's counsel as to possible errors of law and lack of appropriate instructions, thus handicapping defendant's counsel materially in the taking of objections to the instructions and the presentation of additional instructions.

11. That the Court erred in permitting the government to re-open their case to present additional evidence in chief without showing good reason therefor as required by law.

/s/ JAMES E. WEIR

*Of Attorneys for Defendant*

Receipt of Copy Acknowledged  
this 19th day of December, 1949.

J. EARL COOPER

United States Attorney

(File Endorsement Omitted)

66

In the District Court

*Order Denying Motion for New Trial*

Now at this time motion for new trial in cause No. 2272 Cr. entitled United States of America, Plaintiff versus Harvey L. Carignan, Defendant, submitted by James E. Weir, of counsel for defendant, without argument.

Whereupon Court denied motion.

Entered Journal No G-20 Page No. 273

Dec 20 1949

67

In United States District Court

*Order Pronouncing Sentence—Dec. 20, 1949*

Now at this time came J. Earl Cooper, United States Attorney, for and in behalf of the Government; came also the defendant, in custody of the United States Marshal, and with

James E. Weir, of his counsel, and this being the time heretofore set for pronouncement of sentence in cause No. 2272 Cr., entitled United States of America, Plaintiff vs. Harvey L. Carignan, Defendant the following proceedings were had to-wit:

The Court now pronounces judgment, of confinement in the Federal Jail at Anchorage, Alaska, until March 3, 1950, when between the hours of 6:00 o'clock A. M. and 8:00 o'clock A. M. said defendant will be hanged by the neck until dead and directs the U. S. Attorney to prepare and submit written judgment and commitment in accordance with the oral judgment given herein, and defendant remanded to custody of the United States Marshal.

ENTERED JOURNAL No G-21 Page 273

DEC 20 1949

68 In the District Court for the Territory of Alaska  
Third Division

No. 2272 Criminal

UNITED STATES OF AMERICA,

PLAINTIFF,

VS.

HARVEY L. CARIGNAN,

DEFENDANT.

*Judgment, Sentence and Commitment—Dec. 20, 1949*

On this 20th day of December, 1949 came J. Earl Cooper, United States Attorney, the attorney for the government, and the defendant appeared in person and by his counsel, James E. Weir, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty without qualification of the offense of murder in the first degree as charged in the indictment on file herein; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant be hanged by the neck until he be dead.

Signed in open court at Anchorage, Alaska this 20th day of December, 1949.

/s/ GEORGE W. FOLTA

*District Judge*

69 Receipt of a copy of the above  
Judgment, Sentence and Commitment  
is hereby acknowledged by me this  
20th day of December, 1949.

/s/ JAMES E. WEIR

Attorney for Defendant

(File Endorsement Omitted)

70 In the District Court for the Territory of Alaska  
Division Number Three at Anchorage

(Title Omitted)

*Notice of Appeal—Filed Dec. 30, 1949*

APPELLANT: Harvey L. Carignan

Federal Jail, Anchorage, Alaska

APPELLANT'S ATTORNEYS: Harold J. Butcher, and

James E. Weir

P. O. Box 156, Anchorage, Alaska

Following a jury trial based on an indictment for "Murder in the First Degree" which trial commenced on the 12th day of December, 1949, the defendant was found guilty and was sentenced to hang by the neck until he be dead, by judgment entered on the 20th day of December, 1949.

That defendant is now confined to the Federal Jail at Anchorage.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the above named and stated judgment.

/s/ HARVEY L. CARIGNAN

Harvey L. Carignan

71 Receipt is hereby acknowledged of a copy  
of the foregoing Notice of Appeal on the  
30th day of December, 1949.

/s/ Ralph E. Moody

Asst. United States Attorney

## ENDORSED:

Filed in the District Court,  
Territory of Alaska, Third Division  
30th day of December, 1949.

M. E. S. BRUNELLE, Clerk

By Muriel E. Fennell, Deputy

(File Endorsement Omitted)

72 Clerk's Certificate to foregoing paper  
omitted in printing.

73 In the District Court for the Territory of Alaska  
Third Division  
(Title Omitted)

*Motion for Transcript—Filed Jan. 24, 1950*

Comes now Harvey L. Carignan, defendant in the above given cause, and moves this Honorable Court to order transcript of the record and other proceedings in the above cause, and permit the defendant to prosecute his appeal heretofore filed in *forma pauperis*.

This motion is based on the affidavit attached hereto, and the other papers filed in this case.

/s/ HAROLD J. BUTCHER

Harold J. Butcher

Attorney for the Defendant

(File Endorsement Omitted)

74 In the District Court for the District of Alaska  
Third Division  
(Title Omitted)

*Affidavit in Forma Pauperis—Filed Jan. 24, 1950*

United States of America }  
Territory of Alaska } ss.:

I, HARVEY L. CARIGNAN, being first duly sworn and on oath depose and say:

That I was the defendant in the above entitled action, and that my case having come for trial before a jury on the 12th day of December, 1949, and said jury having returned a verdict of guilty to a charge of murder in the first degree,



and the Court having imposed a death sentence, and having filed Notice of Appeal from the sentence and judgment of the Court, and being totally without funds of my own, and not having been successful in efforts to raise funds elsewhere, and having exhausted every means and method of securing private funds,

I hereby petition this Honorable Court to adjudge me a pauper and permit me to proceed in the prosecution of this appeal in *forma pauperis*; and to appoint Harold J. Butcher and James E. Weir, who served me in the trial of  
75 this case, to prosecute my appeal from the sentence and judgment of the Court as aforesaid.

That I have good cause to believe that an appeal will disclose and point out certain irregularities and prejudicial errors occurring prior to and during the proceedings of the trial court, and that the verdict of guilty returned therein can be reversed.

That the most important grounds for appeal, among others, are:

1. That the indictment returned by the Grand Jury failed to provide and name the District Court for the Territory of Alaska, as provided by law.

2. That said indictment did not state sufficient allegation to constitute a judgment of first degree murder against the defendant.

3. That the Court erred in denying the defendant's motion for a transfer of the case to another jurisdiction on the grounds of impossibility to have a fair trial in the Third District Court at Anchorage as a result of local prejudice.

4. That the Court erred in denying defendant's motion to dismiss on the grounds that he had not been given a preliminary hearing, and was denied the right of counsel while held in custody during the period up to his arraignment on the indictment.

76 5. That the verdict is not supported by the evidence.

6. That the Court erred in refusing to permit defendant to take the stand and testify as a preliminary matter on the admissibility of the confession.

7. That the Court erred in denying defendant's motion for judgment of acquittal when the government rested their case on the grounds that the material allegation of the indictment had not been proved.

8. That the Court erred in denying the defendant the right to call witnesses to his defense on the basis that he

was an indigent defendant and had no means to procure witnesses.

9. That the Court erred in admitting a confession into evidence which was clearly involuntary and was procured by means of secret interrogation, promises, inducements, and psychological pressure on the part of police officers, over a period of several days while the defendant was held in custody and without benefit of counsel.

10. That the Court erred in permitting the Witness, Gardner, to take the stand in the government's rebuttal testimony when no direct rebuttal appeared to be possible from the witness who was not present nor with the defendant on the day of the commission of the crime, and the prejudice resulting from the questions of the United States Attorney submitted to certain witnesses, and from the fact that he was permitted to ask leading questions which brought to the attention of the jury other crimes and acts of the defendant at other times and places having nothing to do with the case at issue.

11. That the Court erred in failing to instruct the jury that no consideration could be taken in the jury's deliberation because of the failure of the defendant to take the stand and testify in his own behalf.

12. That the Court failed to allow any time between the furnishing of copies of instructions to jury, and the reading of said instructions to the jury, for review by defendant's counsel as to possible errors of law and lack of appropriate instructions, thus handicapping defendant's counsel materially in the taking of objections to the instructions and the presentation of additional instructions.

13. That the Court erred in permitting the government to re-open their case to present additional evidence in chief without showing good reason therefor as required by law.

14. That the Court failed to instruct the Jury as to the value of the confession as evidence."

/s/ HARVEY L. CARIGNAN  
Harvey L. Carignan

SUBSCRIBED and sworn to before me this 20th day of January, 1950.

ANNA B. SOUTHARD  
*Notary Public, in and for Alaska*  
My commission expires:  
U. S. Commissioner, *ex-officio*.  
Notary Public, Seward Precinct,  
residing in Seward, Alaska

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## In District Court

*Hearing on Motion for Transcript of Record in Forma Pauperis—Jan. 31, 1950*

Now at this time hearing on motion for transcript of record in *Forma Pauperis* in cause No. 2272 Cr., entitled United States of America, Plaintiff versus Harvey L. Carignan, Defendant, came on regularly before the Court, J. Earl Cooper, United States Attorney, appearing for and in behalf of the Government, the defendant not being present but represented by Harold J. Butcher and James E. Weir, of counsel for defendant. The following proceedings were had to-wit:

Argument to the Court was had by Harold J. Butcher, for and in behalf of the Defendant.

Argument to the Court was had by J. Earl Cooper, for and in behalf of the Government.

Argument to the Court was had by Harold J. Butcher, for and in behalf of the Defendant.

WHEREUPON the Court having heard the arguments of respective counsel and being duly and fully advised in the premises, directs written briefs and allows extension of 30 days beyond the 40 day period allowed by rule, within which to docket and file the record with Court of appeals, and granted 10 days within which to request time be set for oral argument or to submit and file briefs.

ENTERED JOURNAL NO. G-21 PAGE NO. 61

JAN. 31, 1950

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## In District Court

*Hearing on Motion for Appeal in Forma Pauperis*

Now at this time hearing on motion for appeal in *forma pauperis* in cause No. 2272 Cr., entitled United States of America Plaintiff versus Harvey L. Carignan, Defendant, came on regularly before the court, Ralph E. Moody, United States Attorney appearing for and in behalf of the Government, the defendant not being present but represented by Harold J. Butcher, of counsel for defendant. The following proceedings were had to-wit:

Argument to the Court was had by Harold J. Butcher, for and in behalf of the Defendant.

Argument to the Court was had by Ralph E. Moody, for and in behalf of the Government.

Whereupon the Court having heard the arguments of respective counsel and being fully and duly advised in the premises, reserved decision.

ENTERED JOURNAL NO. G-21 PAGE NO. 145,  
FEB. 24, 1950

80 In the District Court for the Territory of Alaska  
Division Number Three at Anchorage

UNITED STATES OF AMERICA,  
PLAINTIFF,  
VS.  
HARVEY L. CARIGNAN,  
DEFENDANT.

No. 2272 Cr.

*Memorandum Opinion—Feb. 27, 1950*

J. EARL COOPER, District Attorney & RALPH MOODY, Assistant District Attorney, for Plaintiff.

HAROLD J. BUTCHER & JAMES WEIR, Attorneys for Defendant.

Defendant, sentenced to death on the verdict of a jury finding him guilty of murder committed in an attempt to perpetrate rape, has moved for an order allowing him to take an appeal in *forma pauperis* and directing that the cost of a stenographic transcript and of printing the record on appeal be paid by the United States.

By Section 1915, Title 28 USCA, the allowance of such a motion is committed to the trial Court's discretion. A prerequisite to allowance is that the appeal be taken in good faith. *Smith v. Johnston*, 109 F. (2) 152 (9th circ.). Manifestly, if the appeal is taken for dilatory purposes or if it is lacking in merit, as where no substantial question of law is involved, it should be denied.

In the case at bar, the only point which may have merit is that the confession of the defendant was inadmissible because, so he contends, it was involuntary. This contention is based on the testimony of officer Herring, to whom

81 it was made, which disclosed that an appeal was made to the defendant to tell the truth under circumstances and in an environment of such a nature as to warrant the argument that it resulted in psychological pressure to such a degree as to vitiate the confession.



Upon being assured by the U. S. Attorney that the confession was freely and voluntarily made, the Court permitted the witness Herring to testify in the presence of the jury as to the circumstances under which it was obtained. Being of the opinion that the confession was voluntarily made, the Court refused to hear the defendant's version out of the presence of the jury and this refusal is now urged as error. Irrespective of the fact that the law relating to the admissibility of confessions, is undergoing an evolutionary process and, therefore, in a state of uncertainty I am of the opinion that counsel is mistaken. If any error was committed, it was committed not in refusing to hear the defendant in connection with a preliminary inquiry conducted in the absence of the jury, but in admitting the confession into evidence in connection with the witness Herring's testimony. Once the Court became convinced that the confession had been freely and voluntarily made, the testimony of the defendant, if received preliminarily, could have accomplished no more than to present a conflict in the testimony, thus requiring the submission of the question to the jury. The defendant was not, as has frequently been stated, denied the opportunity to tell his story to the jury. On the contrary, he declined to testify. This, of course, was a choice he had the right to make. Had 82 he told his story to the jury, it would have become the duty of the jury to determine whether the confession was voluntary. Having declined to do so it became the duty of the Court to pass on its admissibility and, as has already been pointed out, the error, if any, was committed then and not in refusing to conduct a preliminary inquiry into its admissibility. That the testimony of Herring, taken in the presence of the jury, might have disclosed that the confession was involuntary, with resultant prejudice of a nature that could not be cured by instructions to the jury, is academic. It was not improper for the court to take the risk, particularly where it not only had confidence in the prosecutor and the witness, but was confronted with a congested docket.

From the foregoing, I am inclined to the opinion that no error was made in admitting the confession. Yet, because the law governing the admissibility of confessions, as laid down in a recent decision of the Supreme Court, is in such confusion that even the members of the court are in disagreement as to its scope, see dissenting opinion of Justice Reed in *Upshaw v. United States*, 335 U. S. 410.

at page 414, the Court cannot say that the admissibility of a confession in any case, including the instant case, does not present a substantial question and constitute good faith. The motion is therefore, allowed.

/s/ GEORGE W. FOLTA  
District Judge

(File Endorsement Omitted)

83 In the District Court for the Territory  
of Alaska

Third Division

(Title Omitted)

*Notice of Motion for Extension of Time to Docket Case—  
Filed March 2, 1950*

Please take notice that at the hour of 2 o'clock, p. m., or as soon thereafter as counsel can be heard, motion will be made for extension of time to docket the case and file the record in the above entitled case; said motion will be based on copy of this notice and on the papers and documents on file in said case.

/s/ HAROLD J. BUTCHER  
Harold J. Butcher

(File Endorsement Omitted)

84 In the District Court for the Territory  
of Alaska

Third Division

(Title Omitted)

*Motion for Extension of Time to Docket and File Record  
on Appeal—Filed March 2, 1950*

Comes now the defendant, Harvey L. Corrigan, and informs this Honorable Court that on the 31st day of January, 1949, he filed his Notice of Appeal from the judgment of the above entitled Court, and under Rule 39 Sub-paragraph C. Federal Rules of Criminal Procedure, defendant was required to docket the appeal and record within 40 days from the date the first notice of appeal was filed, and that on the 31<sup>th</sup> day of January, 1950, defendant's counsel ap-

peared in open court and requested an extension of time for docketing the record on appeal due to the pending, but yet undecided decision on defendant's motion to perfect his appeal in *forma pauperis*; and that on the 27th day of February, 1950, the Honorable Judge George W. Folta granted defendant's motion to perfect his appeal in *forma pauperis*, and that defendant now requires additional time for the securing of the reporter's transcript of trial proceedings and the transcript of the record from the office of the Clerk of the Court; and that the reporter, Mildred K. Maynard, has advised defendant's counsel by telegram dated February 28, 1950, that she estimates approximately 4 weeks will be required to produce and prepare the transcript, following which time at least one week should be allowed for transmittal of the record to the United States Court of Appeals in San Francisco.

And it is therefore respectfully prayed that the time for docketing and filing the record on appeal be extended to and including the 7th day of April, 1950.

/s/ HAROLD J. BUTCHER  
Attorney for the Defendant

(File Endorsement Omitted)

86 In United States District Court

*Order Extending Time*

Now at this time upon motion of Harold J. Butcher, of counsel for Defendant,

IT IS ORDERED that in cause No. 2272 Cr., entitled United States of America, Plaintiff versus Harvey L. Carignan, Defendant, time within which to docket the case and file the record with the United States Court of Appeals be, and is hereby extended to and through April 7, 1950.

ENTERED JOURNAL NO. G-21 PAGE NO. 167

MAR 2 1950

87 In the District Court

*Order Forwarding Original Papers in Appeal  
in Forma Pauperis—April 3, 1950*

Now at this time upon motion of Harold J. Butcher, counsel for defendant.

IT IS ORDERED that newspaper clippings filed in the case of 2272 Cr., entitled United States of America, Plaintiff,

versus Harvey L. Carrignan, Defendant, be sent to the Court of Appeals in the original instead of prepared certified copies.

ENTERED JOURNAL No. G-21 PAGE No. 273

APRIL 3 1950

1 *Reporter's Transcript of Record*

BE IT REMEMBERED, that on the 12th of December, 1949, at 10:00 o'clock a. m., at Anchorage, Alaska, the above-entitled cause came on for trial before a jury, the HONORABLE GEORGE W. FOLTA, United States District Judge, presiding; the Government appearing by J. EARL COOPER, United States Attorney, and RALPH MOODY, Assistant United States Attorney, defendant appearing in person and by HAROLD BUTCHER and JAMES WEIR, his attorneys:

THEREUPON, the following proceedings were had, to-wit:  
The COURT: You may proceed to empanel the jury in the case of United States vs. Carrignan.

*Motion for Change of Venue and Denial Thereof*

Mr. BUTCHER: Your Honor, I would like to renew my motion made a few days ago without submitting any further argument as to possibility of change of venue, and to observe that during the entire time the argument was made the entire jury panel was present in court and  
2 couldn't help but overhear all the argument that was made and comments passed back and forth and also the fact that the other trial being so close to this trial, it would seem to me to be impossible for anyone who might be a juror or potential juror to eliminate from his mind the facts of that trial, and to again ask the Court to transfer the case.

The COURT: Well, there was no argument on the part of the United States, and my recollection of your argument—everything that you said would tend to favor and not prejudice the defendant. The motion is denied, but without prejudice, however, to a renewal of it, if during the selection of the jury it becomes apparent that the prejudice is what you think it is.

Mr. BUTCHER: Then, your Honor, I would like to make another motion at this time. The original procedure involved in this particular case was not in accordance with the Rules of Criminal Procedure. The Rules of Criminal



Procedure, the new Rules, provide that if a man is charged with a crime he be taken before a magistrate and informed of that charge and advised as to his Constitutional rights. In this case Mr. Carignan was held technically on another charge for which he was taken before a magistrate, that is, the assault with intent to commit rape, and informed of his Constitutional rights. In the present case there was no effort

3       made during a period of several weeks that he was held, to take him before a magistrate and that he was not taken and did not appear in court on that charge until after his indictment and the time of his arraignment, when he was advised as to his Constitutional rights, and during that period of time the defendant was exposed to secret interrogations and all the other matters for which the Rules are provided to protect the defendant. For that reason I ask that the—or I state, that the case did not follow the Rules of Criminal Procedure, the development of the case up to the time of the indictment, and under those Rules and under the Constitution, the defendant is entitled to those Constitutional rights, but was denied them, so that the original proceedings are defective.

The Court: That question may be raised during the course of the trial also. You may proceed to empanel the jury.

Clerk of Court: Hulda Nelson, John R. Swanson, Priscilla Gibson, Delbert W. Hosler, Mrs. G. A. Benedict, George A. Boire, Ben H. Mayfield, Charles T. Curtis, E. C. Hagen, Earl Plumb, Celia C. Hewitt, Jean Wright.

WHEREUPON all members of the jury panel were duly sworn to make true answers to such questions as may be put to them by Court or counsel touching their qualifications to serve as jurors in the case on trial.

The Court: Members of the jury panel, particularly those members seated in the jury box, the defendant is charged  
4       here with first degree murder alleged to have been committed in the perpetration or the attempt to perpetrate the crime of rape upon one Laura A. Showalter on the 31st day of July, 1949, at Anchorage. You have all either been instructed or have heard instructions or have heard of certain rules by which criminal trials are governed, and which you must apply in arriving at a verdict, such as the rule that the Government must prove guilt beyond a reasonable doubt before a conviction may be had, and the doctrine of the presumption of innocence; that is, that the

defendant is presumed to be innocent until that presumption has been overcome by evidence and, I assume that having heard it, you are thoroughly familiar with it, and that it will be unnecessary for counsel to dwell unduly on these rules. If however, you are unable to give effect to those rules, or to that presumption, you would be disqualified and you should disclose that fact. Likewise, if for any reason, you could not follow the instructions of the Court as to the law applicable to this case, you would also be disqualified. Counsel will now examine you more particularly with reference to your qualifications to sit in this case. The United States Attorney may proceed to examine the jury.

### *Voir Dire Examinations of Jurors*

MR. COOPER: Thank you, your Honor. Mrs. Nelson, I believe you have had previous jury experience; is that correct?

Mrs. NELSON: I have.

MR. COOPER: And you understand in a general way your responsibility as a juror in a case of this kind?

5 Mrs. NELSON: Yes, sir.

MR. COOPER: Do you know anything about the facts of this particular case?

Mrs. NELSON: No, I do not.

MR. COOPER: Are you acquainted with the defendant, Mr. Carignan?

Mrs. NELSON: No.

MR. COOPER: Do you know either Mr. Weir or Mr. Butcher, his attorneys?

Mrs. NELSON: No.

MR. COOPER: You understand the nature of the charge in this case, do you not?

Mrs. NELSON: Yes, I do.

MR. COOPER: Now, Mrs. Nelson, do you have such conscientious opinions against the imposition of the death sentence as would preclude you from returning a verdict of guilty in this case, where the sentence imposed by law may be that of death?

Mrs. NELSON: No, I haven't.

MR. COOPER: Do you know of any reason at all why you could not serve as a fair and impartial juror in this case?

Mrs. NELSON: No, I do not.

MR. COOPER: You can say that without any mental reservations whatsoever?

Mrs. NELSON: Yes, sir.

6 — Mr. COOPER: Pass the juror for cause. Mr. Swanson, you likewise have had previous jury experience, have you not?

Mr. SWANSON: Yes, sir.

Mr. COOPER: And you understand your responsibility in general as a juror if selected in this case?

Mr. SWANSON: I do.

Mr. COOPER: Do you know anything about the facts of this particular case?

Mr. SWANSON: No, I don't.

Mr. COOPER: Are you acquainted with the defendant, Mr. Carignan?

Mr. SWANSON: No, sir.

Mr. COOPER: Are you acquainted with either Mr. Weir or Mr. Butcher, his attorneys?

Mr. SWANSON: No, I am not.

Mr. COOPER: Mr. Swanson, do you have such conscientious scruples against the imposition of the death sentence as would preclude you from returning a verdict of guilty in this case, where the sentence imposed by law may be that of death?

Mr. SWANSON: No.

Mr. COOPER: Do you know of any reason whatever you couldn't serve as a fair and impartial juror in this case?

Mr. SWANSON: No, sir.

Mr. COOPER: And you can say that without any mental reservation whatsoever?

7 — Mr. SWANSON: I can.

Mr. COOPER: Pass the juror for cause. Mrs. Gibson?

Mrs. GIBSON: Yes, sir.

Mr. COOPER: I believe you have also had previous jury experience?

Mrs. GIBSON: Yes, I have.

Mr. COOPER: And you recognize your responsibilities in a case of this kind?

Mrs. GIBSON: I do.

Mr. COOPER: Do you know anything about the facts of this particular case?

Mrs. GIBSON: No, I do not.

Mr. COOPER: Are you acquainted with the defendant in this case, Mr. Carignan?

Mrs. GIBSON: No.

Mr. COOPER: Do you know Mr. Weir or Mr. Butcher, his attorneys?

Mrs. GIBSON: Just to see them here is all.

Mr. COOPER: Mrs. Gibson, do you have such conscientious scruples against the imposition of the death sentence as would preclude you from returning a verdict of guilty in this case, where the sentence imposed by law may be that of death?

Mrs. GIBSON: I don't.

Mr. COOPER: Do you know of any reason at all why you couldn't serve as a fair and impartial juror in this case?

Mr. GIBSON: No.

Mr. COOPER: And if selected as a juror, Mrs. Gibson, would you base your verdict entirely on the evidence in accordance with the Court's instructions, without any sympathy or passion whatsoever?

Mrs. GIBSON: I would.

Mr. COOPER: You wouldn't permit any sympathy that you might find creeping up in this case to affect you in your deliberations as a juror, would you, Mrs. Gibson?

Mrs. GIBSON: No.

Mr. COOPER: We will pass the juror for cause. Mr. Hosler, I believe you have had some previous experience as a juror, too, have you not?

Mr. HOSLER: I have never sat on a case before.

Mr. COOPER: You understand do you not, Mr. Hosler, that as a juror, if selected as a juror in this case, that the Government will present evidence by witnesses sworn in the jury box and, at the conclusion of the case, the Court will give you certain instructions as to what the law is? Now, do you feel, that if selected as a juror, that you could base your verdict in this case entirely on the evidence given here in court and in accordance with the Court's instructions?

Mr. HOSLER: Yes.

Mr. COOPER: And you wouldn't permit any sympathy or passion to influence you one way or another in your deliberation upon this case, is that correct?

Mr. HOSLER: That is right.

Mr. COOPER: You don't know anybody about the facts of this particular case, Mr. Hosler?

Mr. HOSLER: None whatsoever.

Mr. COOPER: Are you acquainted with Mr. Weir or Mr. Butcher, the attorneys for the defendant in this case?

Mr. HOSLER: No, sir.

Mr. COOPER: Are you acquainted with the defendant?



Mr. HOSLER: No, sir.

Mr. COOPER: Mr. Hosler, do you have such conscientious scruples against the imposition of the death penalty as would preclude you from returning a verdict of guilty in this case where the penalty imposed by law may be that of death?

Mr. HOSLER: No.

Mr. COOPER: Do you know of any reason at all why you couldn't serve as a fair and impartial juror in this case?

Mr. HOSLER: No.

Mr. COOPER: And you make that statement without any mental reservation whatsoever?

Mr. HOSLER: Yes.

Mr. COOPER: Pass the juror for cause. Mrs. Benedict?

Mrs. BENEDICT: Yes, sir.

Mr. COOPER: Have you had previous jury experience?

Mrs. BENEDICT: I have not sat on a panel before.

10 Mr. COOPER: You recognize, however, by virtue of being present in court, what your general responsibilities are if selected as a juror?

Mrs. BENEDICT: Yes, I do.

Mr. COOPER: Do you know anything about the facts of this particular case?

Mrs. BENEDICT: No, I do not.

Mr. COOPER: Are you acquainted with Mr. Carignan, the defendant in this case?

Mrs. BENEDICT: No.

Mr. COOPER: Are you acquainted with Mr. Butcher or Mr. Weir, his counsel?

Mrs. BENEDICT: No.

Mr. COOPER: Mrs. Benedict, do you have such conscientious scruples against the imposition of the death sentence as would preclude you from returning a verdict of guilty in this case where the penalty prescribed by law may be that of death?

Mrs. BENEDICT: No, I do not.

Mr. COOPER: Do you know of any reason whatever why you couldn't serve as a fair and impartial juror in this case?

Mrs. BENEDICT: No.

Mr. COOPER: And you make that statement without any mental reservation whatever?

Mrs. BENEDICT: Yes.

Mr. COOPER: Pass the juror for cause. Mr. Boire?

11 Mr. BOIRE: Yes, sir.

Mr. COOPER: Do you know anything about the facts of this case?

Mr. BOIRE: No, I don't.

Mr. COOPER: Are you acquainted with the defendant, Mr. Carignan?

Mr. BOIRE: No.

Mr. COOPER: Do you know his attorneys, Mr. Weir or Mr. Butcher?

Mr. BOIRE: No.

Mr. COOPER: Mr. Boire, do you have any such conscientious opinions against the imposition of the death sentence penalty as would preclude you from returning a verdict of guilty in this case where the sentence imposed by law may be that of death?

Mr. BOIRE: No.

Mr. COOPER: Do you know of any reason at all why you could not serve as a fair and impartial juror in this case?

Mr. BOIRE: No, I don't.

Mr. COOPER: And you can make that statement without any mental reservation whatever?

Mr. BOIRE: Yes.

Mr. COOPER: Pass the juror for cause. Mr. Mayfield?

Mr. MAYFIELD: Yes, sir.

12 Mr. COOPER: Do you know anything about the facts of this particular case?

Mr. MAYFIELD: No.

the defendant,

M. K. M.

Mr. COOPER: Are you acquainted with / Mr. Carignan?

Mr. MAYFIELD: No, I am not.

either

M. K. M.

Mr. COOPER: Do you know / of his counsel, Mr. Weir or Mr. Butcher?

Mr. MAYFIELD: I know Mr. Butcher casually.

Mr. COOPER: And there is nothing about the fact that you know Mr. Butcher that would affect you in any way in your deliberation as a juror if selected in this case, is there?

Mr. MAYFIELD: No, there isn't.

Mr. COOPER: You would base your verdict entirely on the evidence given here in court and in accordance with the Court's instructions, is that correct?

Mr. MAYFIELD: That is right.

Mr. COOPER: Do you have any conscientious scruples against the imposition of the death sentence as would prevent you, Mr. Mayfield, in returning a verdict of guilty in this case, where the penalty prescribed by law may be that of death?

Mr. MAYFIELD: No.

Mr. COOPER: Do you know of any reason whatsoever you couldn't serve as a fair and impartial juror in this case?

Mr. MAYFIELD: No.

Mr. COOPER: And you can make that statement without any mental reservation whatsoever?

13 Mr. MAYFIELD: Yes.

Mr. COOPER: Pass the juror for cause. Mr. Curtis?

Mr. CURTIS: Yes, sir.

Mr. COOPER: You recognize your general responsibilities as a juror if selected in this case, I assume?

Mr. CURTIS: I do.

Mr. COOPER: Do you know anything about the facts of this particular case?

Mr. CURTIS: No, I don't.

Mr. COOPER: Are you acquainted with the defendant, Mr. Carignan?

Mr. CURTIS: No.

Mr. COOPER: Do you know either of his counsel, Mr. Weir or Mr. Butcher?

Mr. CURTIS: No.

Mr. COOPER: Mr. Curtis, do you have any such conscientious opinions against the imposition of the death sentence as would preclude you from returning a verdict of guilty in this case where the penalty provided by law may be that of death?

Mr. CURTIS: No, I have not.

Mr. COOPER: Do you know of any reason at all, Mr. Curtis, why you couldn't serve as a fair and impartial juror in this case?

Mr. CURTIS: No, I do not.

14 Mr. COOPER: And you make that statement without any mental reservation whatsoever?

Mr. CURTIS: Yes, sir.

Mr. COOPER: Pass the juror for cause. Mrs. Hewitt?

Mrs. HEWITT: Yes.

Mr. COOPER: Do you know anything about the facts of this case, Mrs. Hewitt?

Mrs. HEWITT: No, I don't.

Mr. COOPER: Are you acquainted with the defendant, Mr. Carignan?

Mrs. HEWITT: No, I am not.

Mr. COOPER: Are you acquainted with either Mr. Weir or Mr. Butcher, his counsel?

Mrs. HEWITT: No, I am not.

Mr. COOPER: Mrs. Hewitt, do you have any such conscientious opinions against the imposition of the death sentence as would preclude you from returning a verdict of guilty in this case where the penalty provided by law may be that of death?

Mrs. HEWITT: No, sir.

Mr. COOPER: Do you know of any reason whatsoever why you couldn't serve as a fair and impartial juror in this case?

Mrs. HEWITT: No, I don't.

Mr. COOPER: If selected as a juror, do you feel that you could base your verdict entirely on the evidence given here in court and in accordance with the Court's instructions as to what the law is, regardless of any sympathy which you might have?

Mrs. HEWITT: I do.

Mr. COOPER: Pass the juror for cause. Miss Wright?

Mrs. WRIGHT: Yes.

Mr. COOPER: Miss Wright, do you know anything about the facts in this particular case?

Mrs. WRIGHT: No, I don't.

Mr. COOPER: Are you acquainted with the defendant, Mr. Carignan?

Mrs. WRIGHT: No, I am not.

Mr. COOPER: Do you know either of his counsel, Mr. Weir or Mr. Butcher?

Mrs. WRIGHT: No, I don't.

Mr. COOPER: Miss Wright—or Mrs. Wright?

Mrs. WRIGHT: Mrs.

Mr. COOPER: Mrs. Wright, I am sorry, Mrs. Wright, do you have any such conscientious opinions against the imposition of the death sentence as would preclude you from returning a verdict of guilty in this case where the penalty provided by law may be that of death?

Mrs. WRIGHT: I don't know of any.

Mr. COOPER: Do you know of any reason whatever why you couldn't serve as a fair and impartial juror in this case?

16 Mrs. WRIGHT: No, I don't.

Mr. COOPER: And you can make that statement without any mental reservation whatsoever?

Mrs. WRIGHT: Yes, I can.

Mr. COOPER: Pass the juror for cause. Mr. Hagen?

Mr. HAGEN: Yes.

Mr. COOPER: Mr. Hagen, do you know anything about the facts of this particular case?



Mr. HAGEN: No, I do not.

Mr. COOPER: Are you acquainted with the defendant, Mr. Carignan?

Mr. HAGEN: No.

Mr. COOPER: Are you acquainted with either of his counsel, Mr. Weir or Mr. Butcher?

Mr. HAGEN: Just through court.

Mr. COOPER: And there is nothing, by virtue of having seen them here in court that would influence you in any way in any verdict that you might be called upon to render, if selected as a juror in this case, is there?

Mr. HAGEN: No, there isn't.

Mr. COOPER: You would base your verdict, would you not, entirely on the evidence given here in court and in accordance with the Court's instructions?

Mr. HAGEN: Yes.

17 Mr. COOPER: Mr. Hagen, do you have any such conscientious opinions against the imposition of the death sentence as would preclude you from returning a verdict of guilty in this case where the penalty imposed by law may be that of death?

Mr. HAGEN: No, I have none.

Mr. COOPER: Do you know of any reason whatsoever why you couldn't serve as a fair and impartial juror in this case?

Mr. HAGEN: No, I do not.

Mr. COOPER: And you can make that statement without any mental reservation whatsoever?

Mr. HAGEN: Yes, I can.

Mr. COOPER: Pass the juror for cause. Mr. Plumb?

Mr. PLUMB: Yes.

Mr. COOPER: Mr. Plumb, what is your occupation?

Mr. PLUMB: Electrical Department, City of Anchorage.

Mr. COOPER: Are you a married man, Mr. Plumb?

Mr. PLUMB: Yes, I am.

Mr. COOPER: How long have you lived here?

Mr. PLUMB: I have been here about twenty years.

Mr. COOPER: I would be safe in saying almost all your life, Mr. Plumb?

Mr. PLUMB: Practically.

Mr. COOPER: You haven't had any previous jury experience, have you, Mr. Plumb?

Mr. PLUMB: I sat on a civil case.

Mr. COOPER: During this term of court?

18 Mr. PLUMB: Yes.

Mr. COOPER: From having been present in court, though, I assume that you understand your responsibilities in general as a juror in a case of this type?

Mr. PLUMB: Yes, I do.

Mr. COOPER: Now, Mr. Plumb, do you know anything about the facts of this particular case?

Mr. PLUMB: Yes, what I assume are the facts.

Mr. COOPER: And the case has been discussed in your presence, has it?

Mr. PLUMB: Yes, I believe I have discussed it with people.

Mr. COOPER: With people who purported to know the facts of the case?

Mr. PLUMB: Yes.

Mr. COOPER: Or, was it just idle gossip?

Mr. PLUMB: No, they purported to know the facts.

Mr. COOPER: By virtue of this discussion you may have heard, have you formed any opinion as to the guilt or innocence of this defendant?

Mr. PLUMB: Yes, I have.

Mr. COOPER: And is that such a fixed opinion that it would be difficult for you to lay it aside, Mr. Plumb?

Mr. PLUMB: I would try to lay it aside, but I am not positive that I could, at this time.

19 Mr. COOPER: Do you feel it would require the introduction of evidence to prompt you to lay aside any opinion that you might have as to the guilt or innocence of this defendant?

Mr. PLUMB: Yes, it would.

The COURT: Well, do you know whether these persons with whom you discussed the case are witnesses?

Mr. PLUMB: No, I don't know that.

The COURT: But they did pretend to have personal knowledge?

Mr. PLUMB: Well, they said they had pretty close facts to it—I took them for facts at that time.

The COURT: Where did they say they obtained the facts from, from others, from observation, or from their senses?

Mr. PLUMB: Well, it was nothing directly; no. It is hearsay.

The COURT: On their part, you mean?

Mr. PLUMB: Yes.

Mr. COOPER: Was it a discussion in the nature of something that the people with whom you conversed had heard from someone else, Mr. Plumb?

Mr. PLUMB: That is right.

Mr. COOPER: So that, so far as the individuals themselves were concerned, and so far as you know, they did not of their own knowledge know anything in connection with the particular facts of this case?

20 Mr. PLUMB: That is right.

Mr. COOPER: In view of that fact, Mr. Plumb, and knowing that it was perhaps something in the nature of rumor that you heard discussed, do you feel that you would still cling to a fixed opinion in this case?

Mr. PLUMB: No, I don't. I would certainly try to take the evidence here and to dismiss anything that I had heard but I wouldn't say it probably wouldn't influence me slightly, that is the only point.

Mr. COOPER: Well, you understand, do you not, Mr. Plumb, if you are selected as a juror in this case, under your oath it would be your responsibility to determine the merits of this case entirely on the evidence given here under oath in court and in accordance with the Court's instructions?

Mr. PLUMB: Yes.

Mr. COOPER: And regardless of any sympathy, prejudice or bias that may have previously existed in your mind, is that your understanding?

Mr. PLUMB: Yes, that is right.

Mr. COOPER: And you feel that you could do that, if selected as a juror in this case, Mr. Plumb?

Mr. PLUMB: No, I don't.

Mr. COOPER: You feel then that you would not be a fair and impartial juror in this case?

Mr. PLUMB: That is right.

21 The COURT: Well, as I understand it, Mr. Plumb, you now have an opinion as to guilt or innocence, or does the opinion concern something else?

Mr. PLUMB: No, I have an opinion at this time—have had ever since—

The COURT: As to the guilt or innocence?

Mr. PLUMB: Yes.

The COURT: And you feel that you would cling to that opinion and be influenced by it even though the persons who spoke to you had nothing but hearsay information?

Mr. PLUMB: Well, I would try.

The COURT: You are doubtful of your ability to be fair and impartial?

Mr. PLUMB: That is right.

The COURT: The juror may be excused until Wednesday morning at 10:00 o'clock.

CLERK OF THE COURT: Ernest E. Weschenfelder.

Mr. COOPER: Mr. Weschenfelder, have you had previous jury experience?

Mr. WESCHENFELDER: Yes, I have.

Mr. COOPER: You understand your obligations in general as a juror, do you not?

Mr. WESCHENFELDER: Yes, I do.

Mr. COOPER: Do you know anything about the facts of this particular case, Mr. Weschenfelder?

22 Mr. WESCHENFELDER: No, I don't.

Mr. COOPER: Are you acquainted with the defendant, Mr. Carignan?

Mr. WESCHENFELDER: No, I am not.

Mr. COOPER: Do you know either Mr. Weir or Mr. Butcher, his attorneys?

Mr. WESCHENFELDER: No, only in the courtroom. I don't know them personally.

Mr. COOPER: You are acquainted with me, are you not, Mr. Weschenfelder?

Mr. WESCHENFELDER: Casual acquaintance; yes.

Mr. COOPER: There is nothing about that acquaintance that would influence you one way or another in any deliberation you might be called upon to make if you are selected as a juror in this case, is there?

Mr. WESCHENFELDER: That would have no effect on the evidence.

Mr. COOPER: You feel that you could base your verdict entirely on the evidence given here in court by witnesses under oath, is that correct?

Mr. WESCHENFELDER: Absolutely.

Mr. COOPER: Now, Mr. Weschenfelder, do you have any such conscientious opinions against the imposition of the death sentence as would preclude you from returning a verdict of guilty in this case where the penalty provided by law may be that of death?

23 Mr. WESCHENFELDER: No, I don't.

Mr. COOPER: Do you know of any reason at all why you you could not serve as a fair and impartial juror in this case?

Mr. WESCHENFELDER: No, I don't.

Mr. COOPER: And you can make that statement without any mental reservation whatsoever?

Mr. WESCHENFELDER: Yes.

Mr. COOPER: Pass the juror for cause.

The COURT: You may proceed with the examination.

Mr. BUTCHER: Mrs. Nelson?

Mrs. NELSON: Yes,

Mr. BUTCHER: You are a resident of Anchorage?

Mrs. NELSON: I am.

Mr. BUTCHER: Are you a long-term resident or a newcomer?

Mrs. NELSON: About thirty years.



Mr. BUTCHER: About thirty years, and you are a housewife?

Mrs. NELSON: I am.

Mr. BUTCHER: And do you have a family?

Mrs. NELSON: Yes.

Mr. BUTCHER: Children?

Mrs. NELSON: Three.

Mr. BUTCHER: Two children?

24 Mrs. NELSON: Three.

Mr. BUTCHER: In answer to Mr. Cooper's question as to whether you knew the facts of this case, your answer was "No" as I recall. Do you know anything at all about the case?

Mrs. NELSON: No, I don't.

Mr. BUTCHER: Have you read anything in the newspapers about it?

Mrs. NELSON: I have read the newspapers; yes.

Mr. BUTCHER: You know, then, as much as was stated in the newspapers?

Mrs. NELSON: I do.

Mr. BUTCHER: And you know that Mr. Carignan was arrested for the crime as charged, as stated to you?

Mrs. NELSON: Yes, I suppose so.

Mr. BUTCHER: And you know that that is Mr. Carignan sitting over here in the uniform?

Mrs. NELSON: Well, I just learned so.

Mr. BUTCHER: And, in your reading of the newspapers, were you influenced at all in any way as to any thought about the crime or Mr. Carignan, by name?

Mrs. NELSON: Well, I was outside from the 12th of September until the 1st of October, and I believe that the most of the news items were in the paper at that time. I was outside during most of September, and I believe that most of the news items were in the paper between the 12th of  
25 September and the 1st of October, but I have read what has been in the paper since, and I know that he has been arrested for the crime, and that is all I know about it.

Mr. BUTCHER: Well, now, before you went outside in September, you do know from the charge as stated by the Judge that this crime occurred?

Mrs. NELSON: Yes, I do.

Mr. BUTCHER: The last day of July, and during that period of time you were aware of newspaper articles, were you not?

Mrs. NELSON: Yes.

Mr. BUTCHER: And there was a search being made at that time?

Mrs. NELSON: Yes.

Mr. BUTCHER: For a person who might have committed the crime?

Mrs. NELSON: Yes.

Mr. BUTCHER: Did that information affect you in any way in thinking about this?

Mrs. NELSON: Well, what do you mean by that? Of course everybody—no one likes to read about a crime like that.

Mr. BUTCHER: Well, no—but did it—it did affect you, prejudice you then in some way, did it, Mrs. Nelson?

Mrs. NELSON: Well, it prejudiced me against all kinds of crimes of that sort; yes.

26 Mr. BUTCHER: Well, now, when you returned from your trip outside and you began to read the papers and that they had apprehended a man whom they alleged was the person who committed the crime, do you recall that?

Mrs. NELSON: Yes.

Mr. BUTCHER: And did you have the same feeling then?

The COURT: Well, I think that we should not examine the juror as to her state of mind from one period to another, over several months. I think the question should be confined to her state of mind now, and if her answers are unsatisfactory then you may cross examine her as to whether she did not, notwithstanding, have an opinion of the kind to which you refer, sometime previously, but at the present time I think the examination should be confined to the state of the juror's mind now, otherwise we will be here a long time.

Mr. BUTCHER: Well, that is true, your Honor. I am appreciative of the fact that it may be a long time, but this is a serious matter and if there is any feeling at all in the mind of the juror I would like to find out about it. The only way I can find out about it is by questioning them as to facts which they may have learned over the period of the last two or three months, and that is my purpose.

27 The COURT: Well, of course, my ruling is not based entirely on the desire to save time, as great as that may be, in view of the fact that this Court can't keep up with its work, but on the fact that it is improper in the first instance. You may cross examine if reason appears for it as to what state of mind the juror was in at

some previous time, but the proper question now is the state of the mind of the juror now, and not at some previous time.

Mr. BUTCHER: Well, as the result of the things you learned by reading the newspapers, your present state of mind is still influenced by those things; you are still aware of those things?

Mrs. NELSON: Well, I am aware of them, but it wouldn't affect my judgment, if that is what you mean.

Mr. BUTCHER: It would not affect your judgment in this case?

Mrs. NELSON: No.

Mr. BUTCHER: Do you have any opinion at the present time as to the guilt or innocence of the defendant?

Mrs. NELSON: No, not until I hear the evidence.

Mr. BUTCHER: Now, if the prosecution fails to present sufficient evidence to convince you that the man is guilty, would you find him innocent?

Mrs. NELSON: Certainly.

Mr. BUTCHER: In your verdict. Pass for cause. Mr. Swanson, Mr. Cooper has interrogated you quite thoroughly on the subject of your residence, and you stated also in answer to a question that you knew nothing of the facts of this case?

28 Mr. SWANSON: No, I don't know anything about it.

Mr. BUTCHER: Do you recall reading anything in the newspapers or hearing anything over the radio?

Mr. SWANSON: Well, I didn't read any newspapers at all, because I was working at the time and long hours. I don't

wasn't even home, and therefore I believe I never read a newspaper article on it, except the recent ones that were printed.

Mr. BUTCHER: You do subscribe to the newspapers?

Mr. SWANSON: Yes.

Mr. BUTCHER: And are you not aware of any headlines in connection with this case?

Mr. SWANSON: No, I don't believe I am aware of any headlines, except that the case was coming up and that is about all.

Mr. BUTCHER: You did know that the case was coming up?

Mr. SWANSON: Yes, it has been in the paper recently here, in the last week or two.

Mr. BUTCHER: ~~You~~ have been on the present jury panel for sometime?

Mr. SWANSON: Yes.

Mr. BUTCHER: You understand that it has been necessary to make several motions, some of them concerned with the possible prejudice of the jury? The fact that I have made such motions—would that prejudice you against me in the handling of this case?

29 Mr. SWANSON: No; certainly not. I don't hold prejudice against anyone.

Mr. BUTCHER: And you have, at this time, no prejudice at all of any kind against the defendant?

Mr. SWANSON: No.

Mr. BUTCHER: Are you acquainted with counsel for the Government?

Mr. SWANSON: I believe I was asked that question once before here, and I believe I said no, but I am acquainted in a business sort of a way with Mr. Cooper. I was his assistant in some personal business about a year ago.

Mr. BUTCHER: Was it anything which represented a matter which would influence you as to anything he might say to give it more weight than anything which other counsel might say?

Mr. SWANSON: Well, it might have at the time, but I have dismissed it and have forgotten about it.

Mr. BUTCHER: Do you know of any reason at all, Mr. Swanson, why you could not be a fair and impartial juror in this case?

Mr. SWANSON: No, sir.

Mr. BUTCHER: You have no mental reservations?

Mr. SWANSON: No, sir.

30 Mr. BUTCHER: And you are able, as you sit in the jury box, and if you are chosen as a juror, to presume that the defendant is innocent until the Government has proved him guilty, and if they fail to do that, you would find a verdict of acquittal?

Mr. SWANSON: Yes.

Mr. BUTCHER: Pass for cause. Mrs. Gibson, you have been on the panel before?

Mrs. GIBSON: Yes, I have.

Mr. BUTCHER: You didn't sit on the last case?

Mr. COOPER: If the Court please, we object to questions as to any specific case that the juror may have sat on.

Mr. BUTCHER: Did you sit on the last case in connection with Mr. Cagnan?



Mrs. GIBSON: No.

Mr. BUTCHER: You haven't sat on a case involving Mr. Carignan?

Mrs. GIBSON: No.

Mr. BUTCHER: You stated also that you knew nothing about the facts in this case, Mrs. Gibson. Is that literally true, you know nothing whatever of the case, do you know what was in the newspapers?

Mrs. GIBSON: Oh, I probably read some of the facts, but I didn't give it any thought. There is always something new coming up.

Mr. BUTCHER: You were aware of the facts that appeared in the newspapers, as stated by the newspapers?

31 Mrs. GIBSON: Yes.

Mr. BUTCHER: And did those influence your mind in any way about this crime?

Mrs. GIBSON: No.

Mr. BUTCHER: Do you know of any reason why you could not be a fair and impartial juror in this case?

Mrs. GIBSON: No.

Mr. BUTCHER: You have an open mind on the subject at the present time?

Mrs. GIBSON: Yes, I do.

Mr. BUTCHER: And are you able to presume that this defendant is innocent until he has been proved guilty by the Government?

Mrs. GIBSON: Yes.

Mr. BUTCHER: And if they fail to present sufficient testimony to prove him guilty, would you find a verdict of innocence?

Mrs. GIBSON: Yes.

Mr. BUTCHER: Pass for cause. Mr. Hosler, where are you employed?

Mr. HOSLER: I work for myself.

Mr. BUTCHER: You work for yourself—you have your own business?

Mr. HOSLER: Yes.

32 Mr. BUTCHER: What is that business?

Mr. HOSLER: Excavating business.

Mr. BUTCHER: Excavating. You have been a resident for sometime, Mr. Hosler?

Mr. HOSLER: I have; about twenty five years.

Mr. BUTCHER: About twenty five years. I believe in answer to Mr. Cooper's question as to whether you knew any of the facts of this case, your answer was "No"?

Mr. HOSLER: Facts, or rumor. I would say, are they not?

Mr. BUTCHER: Well, you are aware, however, of the ostensible facts as they appeared in the newspaper, or purported to be the facts, as stated in the newspaper?

Mr. HOSLER: Yes, certainly.

Mr. BUTCHER: And do you—did you follow the papers consistently during the period of time?

Mr. HOSLER: Yes.

Mr. BUTCHER: Up to the present time?

Mr. HOSLER: Yes.

Mr. BUTCHER: And as the result of reading the articles in the newspapers, were you influenced in any way whatever towards this case?

Mr. HOSLER: Well, from reading something you are bound to be influenced. I was influenced, of course, but I didn't understand them as facts, as they were stated in the paper.

33 Mr. BUTCHER: Did that reading and that information that came to you through the newspapers, did that have any effect upon your present state of mind?

Mr. HOSLER: No.

Mr. BUTCHER: As to the guilt or innocence of the defendant?

Mr. HOSLER: I would try not.

Mr. BUTCHER: You would try not, but it would take an effort, would it?

Mr. HOSLER: I don't know; I haven't heard any of the facts in the case.

Mr. BUTCHER: Well, these things you read, which you would try not to let influence you, could they possibly influence you in any degree?

Mr. HOSLER: It is rather difficult to answer that yes or no.

Mr. BUTCHER: Would it take evidence presented by the defendant to convince you that he was innocent?

Mr. HOSLER: Not necessarily. He is innocent, as far as the Court is concerned.

Mr. BUTCHER: And as far as you are concerned?

Mr. HOSLER: That is right.

Mr. BUTCHER: And, in your present state of mind, would you have to be convinced further than you are now?

Mr. HOSLER: That he is innocent?

34 Mr. BUTCHER: That he is guilty.

Mr. HOSLER: Oh, of course; yes.

Mr. BUTCHER: Pass for cause. Mrs. Benedict, you have been on the panel, have you not?

Mrs. BENEDICT: I have been on the jury, but I have not served on a panel.

Mr. BUTCHER: This is your first case then?

Mrs. BENEDICT: Yes.

Mr. BUTCHER: And I believe you also answered "No", that you didn't know any facts in the case. Do you know what appeared in the newspapers about this case?

Mrs. BENEDICT: Very little. I usually read the headlines, and I don't go on with the rest of it.

Mr. BUTCHER: You are aware then, however, of the nature of this case as the result of reading the newspapers?

Mrs. BENEDICT: Oh, yes.

Mr. BUTCHER: And have been so aware for sometime?

Mrs. BENEDICT: Yes.

Mr. BUTCHER: And did that information you obtained from reading the newspapers affect you any in your understanding and your approach to this matter of being a juror?

Mrs. BENEDICT: No.

Mr. BUTCHER: Do you have an open mind at the present time as far as the defendant is concerned?

Mrs. BENEDICT: Yes.

35 Mr. BUTCHER: You could—you are able to presume his innocence then until the Government has proved him guilty?

Mrs. BENEDICT: Yes.

Mr. BUTCHER: And if they fail to prove him guilty, then you would find a verdict of not guilty?

Mrs. BENEDICT: Yes.

Mr. BUTCHER: Pass for cause. Your name is Mr. Boire?

Mr. BOIRE: Yes, sir.

Mr. BUTCHER: G. A. Boire?

Mr. BOIRE: That is right.

Mr. BUTCHER: George A. Boire?

Mr. BOIRE: Yes.

Mr. BUTCHER: Mr. Boire, are you aware of any of what are purported to be facts in this case as the result of the information published about the case in the newspapers?

Mr. BOIRE: No, I don't put too much stock in the newspapers, anyway, in that line.

Mr. BUTCHER: You understand them as reports of matters and not as facts, then, is that what you mean?

Mr. BOIRE: Yes, that is what I mean.

Mr. BUTCHER: And, in the present case, whatever you read, did you consider that to be reporting and not facts?

Mr. BOIRE: That is right.

Mr. BUTCHER: And your present disposition towards the defendant is to presume him innocent?

36 Mr. BOIRE: Yes.

Mr. BUTCHER: And you can carry that presumption until the Government has presented evidence sufficient to prove otherwise?

Mr. BOIRE: Yes.

Mr. BUTCHER: Do you know of any reason at all, Mr. Boire, why you couldn't be a fair and impartial juror in this case?

Mr. BOIRE: No, I don't.

Mr. BUTCHER: You have no mental reservations?

Mr. BOIRE: None.

Mr. BUTCHER: Pass for cause. Mr. Mayfield, you have served on the jury before?

Mr. MAYFIELD: Yes, I have.

Mr. BUTCHER: Mr. Mayfield, you also answered "No", that you knew none of the facts. Do you know anything about what is purported to be the facts?

Mr. MAYFIELD: Yes.

Mr. BUTCHER: As published in the newspapers?

Mr. MAYFIELD: Yes; I followed the newspapers.

Mr. BUTCHER: And did the stories in the newspapers affect you in any way as to your disposition towards this case?

Mr. MAYFIELD: No, because I don't think they know the facts.

37 Mr. BUTCHER: At the present time do you have any feeling at all, any emotion, passion or prejudice, that would prevent you from being a fair and impartial juror?

Mr. MAYFIELD: No, I don't.

Mr. BUTCHER: Your mind is open at this time completely as to the defendant?

Mr. MAYFIELD: That is right.

Mr. BUTCHER: And you are able to presume him innocent until the Government has proved him guilty?

Mr. MAYFIELD: Yes.

Mr. BUTCHER: Pass for cause. Mr. Curtis, are you employed by the City of Anchorage?

Mr. CURTIS: No, I am not.

Mr. BUTCHER: Were you formerly-

Mr. CURTIS: No.

Mr. BUTCHER: What is your occupation?

Mr. CURTIS: I am a fisherman.



Mr. BUTCHER: You are a fisherman?

Mr. CURTIS: Yes.

Mr. BUTCHER: You have been on the panel before?

Mr. CURTIS: Yes.

Mr. BUTCHER: Did you sit on the panel in the previous case?

Mr. CURTIS: Which?

Mr. BUTCHER: The Carignan case.

Mr. CURTIS: No, sir.

38 Mr. BUTCHER: Mr. Curtis, are you aware of any emotion or feeling about this case at all that would prevent you from being a fair and impartial juror?

Mr. CURTIS: Not a thing.

Mr. BUTCHER: Nothing in your mind or in your heart as to this defendant that would keep you from doing justice as far as he was concerned, if you felt that a verdict of not guilty was to be obtained from the evidence?

Mr. CURTIS: I didn't exactly get your question.

Mr. BUTCHER: I will restate the question. Are you able to presume him innocent at the present time?

Mr. CURTIS: Yes.

Mr. BUTCHER: And would it take evidence on the part of the Government beyond a reasonable doubt to change that presumption?

Mr. CURTIS: Yes, sir.

Mr. BUTCHER: Do you know of any reason at all why you couldn't be a fair and impartial juror?

Mr. CURTIS: No, I do not.

Mr. BUTCHER: Pass for cause. Mrs. Hagen—is that correct?

Mrs. HEWITT: No, Hewitt.

Mr. BUTCHER: Mrs. Hewitt, I believe your answer to Mr. Cooper's question about whether you would be a fair and impartial juror, and also particularly whether  
39 you knew any of the facts of this case, and particularly the ~~last~~ question—your answer was "No"?

Mrs. HEWITT: That is right.

Mr. BUTCHER: And did you mean by that that you knew nothing whatever about the case?

Mrs. HEWITT: I read about it in the newspapers.

Mr. BUTCHER: You do know, then, what the newspapers purported to be the facts?

Mrs. HEWITT: Yes.

Mr. BUTCHER: And when you read them did you consider them to be facts at that time?

Mrs. HEWITT: Not exactly.

Mr. BUTCHER: Well, did you consider them to be partially true or all true or not true at all?

Mrs. HEWITT: No; personally I don't know the facts.

Mr. BUTCHER: Do you have any opinion at this time as to the guilt or innocence of the defendant?

Mrs. HEWITT: No, I don't.

Mr. BUTCHER: Your mind is entirely open at this time?

Mrs. HEWITT: That is right.

Mr. BUTCHER: And do you presume him innocent until the Government has proved him guilty?

Mrs. HEWITT: That is right.

Mr. BUTCHER: And you believe you can carry that presumption until you are convinced otherwise?

40 Mrs. WRIGHT: That is right.

Mr. BUTCHER: Pass for cause. Your name is, Jean Wright?

Mrs. WRIGHT: Yes.

Mr. BUTCHER: Mrs. Wright, I believe you answered in response to Mr. Cooper when he asked you if you knew the facts, your answer was "No"?

Mrs. WRIGHT: I don't know too many of them, because I was writing a book at the time and I was very concerned with it and I didn't pay much attention.

Mr. BUTCHER: You were, however, aware of the newspaper articles?

Mrs. WRIGHT: Well, after a fashion: yes.

Mr. BUTCHER: And did reading those articles affect you in any way?

Mrs. WRIGHT: Well, not too much, because I was too concerned about my book.

Mr. BUTCHER: Well, did they affect you at all?

Mrs. WRIGHT: Well, I thought it was terrible to read of such things happening in our town, but it was sort of a remote sort of a thing.

Mr. BUTCHER: Did that influence you in such a way that it would affect your disposition in this case at the present time, as to guilt or innocence of the defendant?

Mrs. WRIGHT: Not at all.

41 Mr. BUTCHER: Are you able to carry the presumption until the Government convinces you otherwise that he is innocent?

Mrs. WRIGHT: Yes, I am.

Mr. BUTCHER: Pass for cause. Mr. Hagen?

Mr. HAGEN: Yes.

Mr. BUTCHER: Mr. Hagen, your answer also to the question of Mr. Cooper as to whether you knew the facts was "No," and do you know anything about the case?

Mr. HAGEN: The answer to that same question was "No," I don't know anything more than I know now, to your question.

Mr. BUTCHER: Well, you have then not read anything in the newspaper about this case?

Mr. HAGEN: No.

Mr. BUTCHER: Have you heard anything over the radio?

Mr. HAGEN: No.

Mr. BUTCHER: Have you been on the panel for some time?

Mr. HAGEN: Yes, I have.

Mr. BUTCHER: You have heard of this case before?

Mr. HAGEN: Yes, in court.

Mr. BUTCHER: Only in court?

Mr. HAGEN: In court.

Mr. BUTCHER: You haven't discussed it with anyone outside of court?

Mr. HAGEN: No, I have not.

42 Mr. BUTCHER: Have you ever heard it discussed in your presence?

Mr. HAGEN: No, I haven't.

Mr. BUTCHER: Do you know of any reason at the present time why you couldn't be a fair and impartial juror?

Mr. HAGEN: No, I do not.

Mr. BUTCHER: Are you able to presume during the present time and during the course of this case that the defendant is innocent until the Government has proved otherwise?

Mr. HAGEN: I believe I am able to decide that.

Mr. BUTCHER: Your mind is completely open then?

Mr. HAGEN: Yes.

Mr. BUTCHER: Pass for cause. Mr. Weschenfelder, I believe you answered that you knew none of the facts of this case, in answer to Mr. Cooper's question?

Mr. WESCHENFELDER: That is right.

Mr. BUTCHER: What is your occupation, Mr. Weschenfelder?

Mr. WESCHENFELDER: I work for the Civil Aeronautics Administration.

Mr. BUTCHER: Civil Aeronautics?

Mr. WESCHENFELDER: Yes.

Mr. BUTCHER: And have you been around here for some time?

43 Mr. WESCHENFELDER: In this vicinity, about eight years, nine years.

Mr. BUTCHER: And do you know any of the purported facts as they appeared in the newspapers about this case?

Mr. WESCHENFELDER: I remember reading something about it when it first came out. It was hard not to, it was headlined.

Mr. BUTCHER: And did the reading of those articles affect you in any way as to your feeling about the defendant?

Mr. WESCHENFELDER: Not at all—well, how do you mean that?

Mr. BUTCHER: Well, for instance, when you read about the apprehension of the defendant, did you then come to any conclusion then about his guilt or innocence?

Mr. WESCHENFELDER: Well, I don't believe I read of the apprehension of the defendant. I was on a vacation I think at that time at Chitina.

Mr. BUTCHER: Do you know of any reason why you couldn't be a fair and impartial juror?

Mr. WESCHENFELDER: No, I don't.

Mr. BUTCHER: Do you have any mental reservations at the present time about this case?

Mr. WESCHENFELDER: No, none at all.

Mr. BUTCHER: At the present time are you able to presume that the defendant is innocent?

Mr. WESCHENFELDER: Yes.

44 Mr. BUTCHER: And you would have to be convinced by the Government and by the testimony presented here that he was guilty before you find him guilty?

Mr. WESCHENFELDER: Absolutely.

Mr. BUTCHER: Pass for cause.

The COURT: The plaintiff's first peremptory challenge.

Mr. COOPER: We waive as to the jurors in the box, your Honor.

The COURT: Defendant's first peremptory challenge.

Mr. BUTCHER: We will ask that Mrs. Nelson be excused.

The COURT: Mrs. Nelson, you are excused to 10:00 o'clock Wednesday morning.

Clerk of COURT: Andrew E. Dennis.

Mr. COOPER: Mr. Dennis, I believe you have had previous jury experience?

Mr. DENNIS: I have.

Mr. COOPER: And you understand your responsibilities in general as a juror in a case of this kind?

Mr. DENNIS: I do.



Mr. COOPER: Do you know anything about the facts of this particular case?

Mr. DENNIS: Only what was in the headlines of the paper, is all?

Mr. COOPER: And from what you read in the headlines and from other things that you may have read in the paper, did you arrive at any opinion as to the guilt or innocence of the defendant?

Mr. DENNIS: I did not.

Mr. COOPER: Are you acquainted with the defendant?

Mr. DENNIS: I am not.

Mr. COOPER: Do you know either of his attorneys, Mr. Weir or Mr. Butcher?

Mr. DENNIS: No, only from what I have seen in court.

Mr. COOPER: Mr. Dennis, do you have any such conscientious opinions against the imposition of the death sentence as would preclude you from bringing in a verdict of guilty in this case where the penalty imposed by law may be that of death?

Mr. DENNIS: I do not.

Mr. COOPER: Do you know of any reason whatsoever why you couldn't serve as a fair and impartial juror in this case?

Mr. DENNIS: No.

Mr. COOPER: And you can make that statement without any mental reservation whatever?

Mr. DENNIS: I do.

Mr. COOPER: We will pass the juror for cause.

Mr. WEIR: Mr. Dennis, I believe you said you read the headlines?

Mr. DENNIS: That is right.

Mr. WEIR: Have you in any way any opinions as to even parts of what the headlines in the articles said?

Mr. DENNIS: I have not.

Mr. WEIR: Mr. Dennis, as the prosecution's case develops, because you—if the prosecution can, as they put on their proof, if parts of that proof are similar to what was in the papers, with what you have read in the papers already, would that lead you to believe or go beyond what the prosecution has put on?

Mr. DENNIS: I would like to clarify my statement on that previous answer. The headlines—I just glanced at the headlines and didn't read the articles. I don't in fact read the articles in the newspapers very often. I don't have much chance.

Mr. WEIR: Mr. Dennis, because of the nature of the crime charged here, do you have any tendency to feel that this should be more severely punished than any other crime?

Mr. COOPER: Now, if the Court please, we certainly object to that question.

The COURT: Yes.

Mr. BUTCHER: What is Mr. Cooper's objection? It seems to me the same questions have been asked before as to whether they have objection against this particular kind of crime.

Mr. COOPER: I don't think that is the question.

The COURT: Well, it wouldn't tend to qualify or disqualify a juror. It is presumed that everyone has prejudice against crime generally. Unless it could be shown that the prejudice against this particular crime was so great or extraordinary or more than the prejudice with reference to other crimes, it would not tend to qualify or to disqualify the juror.

Mr. WEIR: Mr. Dennis, what is your business?

Mr. DENNIS: I am a boilermaker.

Mr. WEIR: Boilermaker?

Mr. DENNIS: That is right.

Mr. WEIR: Do you work for yourself or—

Mr. DENNIS: I work for the Alaska Railroad.

Mr. WEIR: Pass the juror for cause.

The COURT: Plaintiff's first peremptory challenge.

Mr. COOPER: We waive, your Honor.

The COURT: Defendant's second peremptory challenge.

Mr. WEIR: Excuse Mrs. Gibson, please.

The COURT: Mrs. Gibson, you are excused to 10:00 o'clock next Wednesday morning.

Clerk of COURT: Robert Claypool.

Mr. COOPER: Mr. Claypool, do you know anything about the facts of this particular case?

Mr. CLAYPOOL: Only what I heard in the courtroom.

Mr. COOPER: By virtue of what you may have heard in the courtroom you certainly haven't formed any opinion as to the guilt or innocence of the defendant, have you?

48 Mr. CLAYPOOL: No, I have not.

Mr. COOPER: Are you acquainted with the defendant, Mr. Carignan?

Mr. CLAYPOOL: No, I am not.

Mr. COOPER: Do you know either Mr. Weir or Mr. Butcher, his counsel?

Mr. CLAYPOOL: I know who they are, the same as I do both of you fellows.

Mr. COOPER: And there is nothing that would influence you one way or the other from that acquaintance, knowing us or knowing counsel for defense, that would influence you to any extent whatsoever, is there, Mr. Claypool?

Mr. CLAYPOOL: None whatsoever.

Mr. COOPER: Mr. Claypool, do you have any such conscientious opinions against the imposition of the death sentence as would preclude you from returning a verdict of guilty in this case where the penalty provided by law may be that of death?

Mr. CLAYPOOL: No; I do not.

Mr. COOPER: Do you know of any reason whatsoever why you couldn't serve as a fair and impartial juror in this case?

Mr. CLAYPOOL: No, I do not.

Mr. COOPER: And you make that statement without any mental reservations?

Mr. CLAYPOOL: Yes, I do.

49 Mr. COOPER: Pass the juror for cause.

Mr. WEIR: Mr. Claypool, have you noticed any articles in the newspaper about this, the crime charged here today?

Mr. CLAYPOOL: When the crime came up I think I was too busy, and later on why I was called on the jury and I believe that you should not go reading too many articles because you may be on the case.

Mr. WEIR: In other words, you didn't read any of the articles that might have appeared?

Mr. CLAYPOOL: That is right.

Mr. WEIR: Mr. Claypool, if the prosecution fails to prove their case beyond a reasonable doubt in your mind, will you bring in a verdict of not guilty?

Mr. CLAYPOOL: Yes, I would.

Mr. WEIR: By reason of the fact of you sitting on a previous case concerning Mr. Carignan, would that influence you any in this present case?

Mr. CLAYPOOL: No. That is entirely different.

Mr. WEIR: Would it require complete evidence on the prosecution's part, beyond a reasonable doubt, before you would bring in a verdict of guilty?

Mr. CLAYPOOL: It absolutely would.

Mr. WEIR: Pass the juror for cause.

The COURT: Plaintiff's first peremptory challenge.

Mr. COOPER: We waive, your Honor.

50 The COURT: Defendant's third peremptory challenge.

Mr. WEIR: Excuse Mrs. Benedict.

The COURT: Mrs. Benedict, you are excused to Wednesday morning at 10:00 o'clock.

Clerk of COURT: W. W. Sherwood.

Mr. COOPER: Mr. Sherwood, what is your business or your occupation?

Mr. SHERWOOD: Sporting goods department, Northern Commercial Company.

Mr. COOPER: You are a married man, are you?

Mr. SHERWOOD: Married; yes.

Mr. COOPER: How long have you resided here in Anchorage?

Mr. SHERWOOD: A little over three years.

Mr. COOPER: Do you know anything about the facts of this case, Mr. Sherwood?

Mr. SHERWOOD: Just what I read in the papers.

Mr. COOPER: Do you know anything about the facts of this case, Mr. Sherwood?

Mr. SHERWOOD: Just what I read in the papers.

Mr. COOPER: By virtue of what you read in the papers, have you formed any opinion as to the guilt or innocence of the defendant in this case?

Mr. SHERWOOD: None.

Mr. COOPER: Are you acquainted with the defendant?

Mr. SHERWOOD: No.

Mr. COOPER: Do you know either Mr. Weir or Mr. Butcher, his counsel?

51 Mr. SHERWOOD: I believe I know them both very slightly.

Mr. COOPER: And there is nothing about that casual acquaintance that would influence you one way or another if you are selected as a juror in this case, is there?

Mr. SHERWOOD: No.

Mr. COOPER: Now you understand, do you not—have you had previous jury experience?

Mr. SHERWOOD: Not on this jury.

Mr. COOPER: You understand your general obligations and responsibilities as a juror, however, do you not, Mr. Sherwood?

Mr. SHERWOOD: I do.

Mr. COOPER: Well, Mr. Sherwood, do you have any such conscientious opinions against the imposition of the death



sentence that would preclude you from returning a verdict of guilty in this case where the penalty prescribed by law may be that of death?

Mr. SHERWOOD: No.

Mr. COOPER: Do you know of any reason whatsoever why you couldn't serve as a fair and impartial juror in this case?

Mr. SHERWOOD: No.

Mr. COOPER: And you can make that statement without any mental reservations at all?

Mr. SHERWOOD: That is right.

52 Mr. COOPER: Pass the juror for cause.

Mr. WEIRS Mr. Sherwood, I believe you said that you followed this in the newspapers?

Mr. SHERWOOD: I believe I read the papers.

Mr. WEIR: As the months and weeks went by, you read the different articles in the newspapers?

Mr. SHERWOOD: All the way through.

Mr. WEIR: By reason of reading those articles where the prosecution's case might—where the newspaper articles and the prosecution's case might come close together, because of your reading the newspaper articles, would that tend you to or lead you to believe the prosecution's case, even though they might leave out a point now and then? In other words, would it give you a general feeling that the prosecution's case and the newspapers are similar?

Mr. SHERWOOD: I think I have no opinion from what I read in the paper.

Mr. WEIR: You have no opinion?

Mr. SHERWOOD: That is right.

Mr. WEIR: And then as you sit there, if you are chosen as a juror you will demand that the prosecution prove the case beyond a reasonable doubt, or you will bring in a verdict of not guilty?

Mr. SHERWOOD: That is right.

Mr. WEIR: Are you married, sir?

53 Mr. SHERWOOD: Married.

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Mr. WEIR: As you have stated you have read the articles as they appeared in the newspapers, as you read them at the times that you read them, did it give you any feeling of fear towards your wife?

Mr. MOODY: Your Honor, we object to that as being an improper question.

The Court: Yes. Objection sustained.

Mr. WEIR: Your Honor, I merely wanted to bring out any unconscious fear or prejudice the juror might have that he is not conscious of.

The COURT: Well, you can ask him whether he is conscious of any bias or prejudice, in addition to asking him as to any opinion, but what his reaction may be to some particular fact or revelation would not necessarily have a tendency to disqualify him, although it might, depending on his answers to the more general questions, become proper to ask it on a searching cross examination, if it becomes necessary, but certainly it is out of order now.

Mr. WEIR: Pass the juror for cause.

The COURT: Plaintiff's first peremptory challenge.

Mr. MOODY: We waive, your Honor.

The COURT: Defendant's fourth peremptory challenge.

Mr. WEIR: Excuse Mr. Mayfield.

The COURT: Mr. Mayfield, you are excused to  
54 Wednesday morning at 10:00 o'clock.

Clerk of COURT: Mary G. Smith.

Mr. MOODY: Mrs. Smith, I believe you have had previous jury experience?

Mrs. SMITH: Yes, sir.

Mr. MOODY: Have you heard or do you know anything about this case?

Mrs. SMITH: No, sir.

Mr. MOODY: Do you know the defendant in this case?

Mrs. SMITH: No, sir.

Mr. MOODY: Do you know his counsel, Mr. Butcher and Mr. Weir?

Mrs. SMITH: I have seen them in the courtroom.

Mr. MOODY: Do you at this time know of any reason why you could not act as a fair and impartial juror in the trial of this case?

Mrs. SMITH: No, I don't.

Mr. MOODY: Do you have any such conscientious opinions against the imposition of the death penalty as would preclude you from finding the defendant guilty in this case where the penalty imposed by law may be death?

Mrs. SMITH: No, sir.

Mr. MOODY: You know of no reason, then, why you could not be a fair and impartial juror in the trial of this case?

Mrs. SMITH: No, I do not.

55 Mr. MOODY: Pass the juror for cause.

Mr. WEIR: Mrs. Smith, I don't recall whether Mr. Moody asked you if you read in the newspapers about this case?

Mrs. SMITH: Well, I usually read the papers; yes.

Mr. WEIR: Have you read about it recently, or since the articles appeared about it in the newspapers?

Mrs. SMITH: I usually read the paper, the town articles, as they come out, but I don't dwell on them in particular. I read the article.

Mr. WEIR: Well, from the newspaper articles that you did read have you any opinion now as to the guilt or innocence of the defendant?

Mrs. SMITH: No, I don't have any opinion.

Mr. WEIR: You have an open mind and you will wait until the evidence is all in before you make up your mind one way or the other?

Mrs. SMITH: Yes, I would.

Mr. WEIR: Have you talked about the case with anyone?

Mrs. SMITH: No, I don't recall talking about it.

Mr. WEIR: Well, Mrs. Smith, has there been any discussion around your home about it?

Mrs. SMITH: No.

Mr. WEIR: Or have you heard any other people discussing the case?

Mrs. SMITH: No, I haven't discussed it with anyone.

56 Mr. WEIR: Pass the juror for cause.

The COURT: Plaintiff's first peremptory challenge.

Mr. MOODY: Plaintiff waives.

The COURT: Defendant's fifth peremptory challenge.

Mr. WEIR: Excuse Mrs. Hewitt.

The COURT: Mrs. Hewitt, you are excused until Wednesday morning at 10:00 o'clock.

Clerk of COURT: Mary Ethel Price.

Mr. COOPER: Mrs. Price, do you know anything about the facts of this case?

Mrs. PRICE: No, I don't.

Mr. COOPER: I believe you reside in Homer, is that correct?

Mrs. PRICE: I do; yes, sir.

Mr. COOPER: Are you acquainted with Mr. Carignan, the defendant in this case?

Mrs. PRICE: I have never seen him before.

Mr. COOPER: Do you know either Mr. Weir or Mr. Butcher, the attorneys for the defendant in this case?

Mrs. PRICE: I have seen them in court, just like I have seen you two gentlemen.

Mr. COOPER: And you know nothing whatsoever about the facts of this case?

Mrs. PRICE: No, sir, I don't.

Mr. COOPER: Mrs. Price, do you have any such conscientious scruples against the imposition of the death sentence which would preclude you from returning a verdict of guilty in this case if the sentence provided by law may be that of death?

Mrs. PRICE: None whatever.

Mr. COOPER: Do you feel you could be a fair and impartial juror in this case?

Mrs. PRICE: I will try to.

Mr. COOPER: Do you know of any reason whatever why you couldn't?

Mrs. PRICE: No, sir.

Mr. COOPER: And you can make that statement, Mrs. Price, without any mental reservation whatever?

Mrs. PRICE: That is right.

Mr. COOPER: Pass the juror for cause.

Mr. WEIR: Mrs. Price, I believe you stated you do not know any of the facts of the case. Have you heard any discussion about it?

Mrs. PRICE: No, sir, I haven't.

Mr. WEIR: Any more or less gossip about it?

Mrs. PRICE: No, sir.

Mr. WEIR: Then at the present time your mind is completely free and you will wait until all the evidence is in before deciding one way or the other?

Mrs. PRICE: I will.

Mr. WEIR: Mrs. Price, if you are picked for one of the jury members at the conclusion of the case when you retire to the jury room if in your mind you are not convinced that the defendant Carignan is guilty, even though perhaps the rest of the jury may be convinced he is guilty, will you still maintain your position until and unless they can logically show you that he is guilty, or change your mind?

Mrs. PRICE: That is a citizen's right. You should prove them innocent until they are proven guilty.

Mr. WEIR: And if you believe he is innocent, you will stick by that?

Mrs. PRICE: Yes, sir, I will.

Mr. WEIR: Pass the juror for cause.

The COURT: Plaintiff's first peremptory challenge, as to Mrs. Price.



Mr. COOPER: We will waive, your Honor.

The COURT: Defendant's sixth peremptory challenge.

Mr. WEIR: Excuse Mrs. Smith.

The COURT: Mrs. Smith, you are excused until Wednesday morning.

Clerk of COURT: Arthur E. Ashley.

Mr. COOPER: Mr. Ashley, do you know anything about the facts of this particular case?

Mr. ASHLEY: No, sir.

Mr. COOPER: Are you acquainted with the defendant, Mr. Carignan?

Mr. ASHLEY: I know who he is when I see him.

Mr. COOPER: Just by seeing him here in court?

Mr. ASHLEY: Yes, sir.

Mr. COOPER: Are you acquainted with either Mr. Weir or Mr. Butcher, his counsel?

Mr. ASHLEY: No, sir.

Mr. COOPER: You have had previous jury experience, have you not?

Mr. ASHLEY: Yes, sir.

Mr. COOPER: Mr. Ashley, do you entertain any such conscientious opinions against the imposition of the death sentence?

Mr. ASHLEY: No, sir.

Mr. COOPER: As would preclude you from returning a verdict of guilty in this case where the penalty imposed by law may be that of death?

Mr. ASHLEY: No, sir.

Mr. COOPER: Do you know of any reason whatsoever why you couldn't serve as a fair and impartial juror in this case?

Mr. ASHLEY: No, sir.

Mr. COOPER: And you can make that statement without any mental reservations?

Mr. ASHLEY: Yes.

60 Mr. COOPER: Pass the juror for cause.

Mr. BUTCHER: Mr. Ashley, how long have you lived in this area?

Mr. ASHLEY: Since April, 1946.

Mr. BUTCHER: What is your occupation?

Mr. ASHLEY: Electrician for Alaska Railroad.

Mr. BUTCHER: Electrician for Alaska Railroad. Do you have a family?

Mr. ASHLEY: I do.

Mr. BUTCHER: Do you reside right in the City of Anchorage?

Mr. ASHLEY: Yes, I do.

Mr. BUTCHER: You stated that you knew nothing of the facts in the case. Do you know anything about the case which has been purported to be facts as reported in the newspapers?

Mr. ASHLEY: No, sir. All I read in the newspaper was, I glanced at the headlines when the thing was supposed to have happened.

Mr. BUTCHER: Did you form any opinion or come to any conclusions as a result of reading those articles which might affect your present attitude?

Mr. ASHLEY: I am sure it didn't, sir.

Mr. BUTCHER: Would you say the same is true about any radio broadcasts you might have heard?

Mr. ASHLEY: Well, the only radio broadcast I have heard simply stated the fact that a woman had been killed and the police were investigating it.

Mr. BUTCHER: And your present state of mind,—is it completely impartial so that you feel you could be a fair and impartial juror if chosen to sit on this case?

Mr. ASHLEY: Absolutely.

Mr. BUTCHER: And would you be able to presume that the defendant is innocent until the Government has presented sufficient testimony to satisfy your mind that he is guilty before you could find him guilty?

Mr. ASHLEY: Yes, sir.

Mr. BUTCHER: Pass for cause.

The COURT: Plaintiff's first peremptory challenge as to Mr. Ashley.

Mr. COOPER: We waive, your Honor.

The COURT: Defendant's seventh peremptory challenge.

Mr. BUTCHER: Excuse Mr. Weschenfelder.

The COURT: Mr. Weschenfelder, you are excused to Wednesday morning at 10:00 o'clock.

Clerk of COURT: Fred Dobler.

Mr. COOPER: Mr. Dobler, I believe you are employed at Fort Richardson at the present time?

Mr. DOBLER: Yes, the Air Installation office at Fort Richardson, that is right.

Mr. COOPER: And you and I have at least a speaking acquaintance, and once or twice have been engaged in some mutual endeavors here in Anchorage?

Mr. DOBLER: That is right.

Mr. COOPER: Those facts wouldn't influence you one way or the other in any effect or to any extent at all in any

deliberation you might be called upon to make if selected as a juror in this case, would it, Mr. Dobler?

Mr. DOBLER: I can't see how it would.

Mr. COOPER: If selected as a juror you would base your verdict entirely on the evidence given here in court and in accordance with the Court's instructions, would you?

Mr. DOBLER: That is correct.

Mr. COOPER: Do you know anything about the facts of this particular case?

Mr. DOBLER: Only what I have seen in the papers.

Mr. COOPER: By virtue of what you saw in the papers, did you form any opinion as to the guilt or innocence of the defendant?

Mr. DOBLER: No.

Mr. COOPER: Are you acquainted with the defendant?

Mr. DOBLER: I never saw him before in my life.

Mr. COOPER: Do you know Mr. Weir or Mr. Butcher, his counsel?

Mr. DOBLER: I know Mr. Butcher by sight only. I have never seen Mr. Weir before that I know of.

63 Mr. COOPER: May I ask you, Mr. Dobler, do you have any such conscientious opinions against the imposition of the death penalty as would preclude you from returning a verdict of guilty in this case where the penalty prescribed by law may be that of death?

Mr. DOBLER: Would the jury decide whether it would be death or not?

Mr. COOPER: I prefer the Court to answer that question.

The COURT: Yes, the jury would decide.

Mr. DOBLER: I would prefer to be excused.

Mr. COOPER: Well, your preference for being excused is based on the fact that it would affect you or that the probability or the fact that the sentence imposed in a case of this kind may be death would influence you one way or another in the verdict, you might be called upon to render, Mr. Dobler?

The COURT: Well, Mr. Dobler, it is one thing to have a conscientious opinion against capital punishment and it is another thing to merely shrink from doing a distasteful duty. Now, merely because it is distasteful would be no reason for excusing you. The most distasteful job the Court has is to sentence people, but the Court cannot avoid it and of course a jury cannot avoid its duty, so that if you have a conscientious opinion of the kind that would preclude you from finding a verdict of that kind, you

64 are disqualified, but if you merely would prefer to be relieved of a distasteful job, you are not disqualified. Now, it is up to you to answer which it is.

Mr. DOBLER: That is the reason, because it is distasteful. I don't like to serve on a jury if the jury is going to decide a death penalty.

The COURT: Then you are not disqualified.

Mr. BUTCHER: Your Honor, may I call the Court's attention that it is my understanding that the jury will not return with any—in the event of a conviction—with any—if the conviction or the verdict is guilty, they simply will return with a guilty verdict, without any remarks as to the imposition of the death sentence, and that if they do so return, then the duty is upon the Court, but they may return with a recommendation or something besides the death sentence, so that it may not become involved in the case at this time. I don't think the juror or the jury may understand that.

The COURT: Well, that may be true. I doubt whether that has been made clear to them. The District Attorney perhaps better elaborate on that so that the juror will know that that is not the only alternative of the verdict. Perhaps I should do that.

Mr. COOPER: I would prefer that.

The COURT: Mr. Dobler, the jury will have it within their power to return a verdict of guilty of murder in the first degree, which casts on the Court the duty of imposing capital punishment, but the jury has the right and the power to qualify their verdict by adding to it "without capital punishment". Now, with that understanding or explanation, you may continue the examination.

Mr. COOPER: Do you know of any reason whatever why you couldn't serve as a fair and impartial juror in this case?

Mr. DOBLER: I can think of no reason why I shouldn't.

Mr. COOPER: If you were convinced beyond a reasonable doubt of the guilt of this defendant after all the evidence is in, would you return a verdict of guilty?

Mr. DOBLER: I certainly should.

Mr. COOPER: And you can say that without any mental reservations whatever?

Mr. DOBLER: That is correct.

Mr. COOPER: Pass the juror for cause.

Mr. BUTCHER: Mr. Dobler, what is your occupation?

Mr. DOBLER: I write contract specifications for the Air Installations office at Elmendorf Airforce base.



Mr. BUTCHER: You are employed by the United States Government?

Mr. DOBLER: I am a Civil Service employee.

Mr. BUTCHER: How long have you lived in Anchorage, Alaska?

Mr. DOBLER: Since 1933.

66 Mr. BUTCHER: I believe you stated you are familiar with some of the facts or what purports to be the facts as the result of hearing about it over the radio and reading about it in the newspaper?

Mr. DOBLER: I don't know whether they are facts or not. I read the newspaper articles.

Mr. BUTCHER: Did the reading of those articles and information, whether it was a fact or otherwise, did it influence your mind in any way as to its disposition at this time?

Mr. DOBLER: It certainly did not, no, sir.

Mr. BUTCHER: You have a completely open mind on the question of guilt or innocence at this time?

Mr. DOBLER: That is right.

Mr. BUTCHER: And, you are able, Mr. Dobler, to presume at this time and also during the presentation of the testimony that the defendant is innocent until you have heard enough testimony to convince you otherwise?

Mr. DOBLER: The defendant is definitely innocent until proved beyond a reasonable doubt.

Mr. BUTCHER: And, if you went into the jury room, after your deliberations began, with some conviction about this case, would you be apt to give up that conviction because other members of the jury were convinced otherwise?

Mr. DOBLER: No.

Mr. BUTCHER: You would stand by your convictions as developed during the process of the trial?

67 Mr. COOPER: If the Court please, we object.

The COURT: I think that that is an improper question for the reason that the Court has ruled here before that

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/ juries are empanelled to agree and not to disagree, and the suggestion that they should disagree or cling obstinately without regard to the others' opinions, to their own opinion, so as to produce disagreement—such questions are im-

proper. In other words, it is an invitation to the juror / to disagree

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or it is something that might impress upon the juror that he may cling to his opinion just from sheer obstinacy. Now, as I say, he has a right to stick with a conscientious opinion,

but not from sheer obstinacy. As I say, the law contemplates and the jury will be instructed that they should agree if possible, and, therefore, any question that would suggest to a juror that he should in all events cling to an initial opinion, is improper.

Mr. BUTCHER: Well, your Honor, I particularly worded that question not as to a conviction of guilt or innocence, but my purpose in asking the question was to get at this previous matter that was raised by Mr. Cooper's questions as to his conviction about capital punishment. I wanted to ascertain from that question whether, if he went into the witness room with convictions about it, whether he would stand on those convictions or not, and I believe the question is quite proper for that purpose.

68 The COURT: Well, there is another reason why it is improper, and that is this: that the juror may not be required to state in advance what his state of mind will be after he gets to the jury room, nor may he be questioned as to what effect certain evidence if produced will have on him. He is not required to state that because he himself cannot tell what effect it will have. You may proceed.

Mr. BUTCHER: May I have an exception on that, please?

The COURT: Yes. You may proceed.

Mr. BUTCHER: Pass the juror for cause.

The COURT: Plaintiff's first peremptory challenge.

Mr. COOPER: Excuse Mr. Dobler, your Honor.

WHEREUPON the juror was excused.

Clerk of COURT: Pauline L. May.

Mr. COOPER: Is it Miss or Mrs. May?

Mrs. MAY: Mrs. May.

Mr. COOPER: Have you had previous jury experience?

Mrs. MAY: Yes, I have.

Mr. COOPER: Do you know anything about the facts of this particular case?

Mrs. MAY: No; I recall seeing some of the newspaper articles but I don't remember the facts.

Mr. COOPER: By virtue of some of the articles that you may have seen, did you arrive at any opinion as to the guilt or innocence of this defendant?

Mrs. MAY: No, I have not.

69 Mr. COOPER: Do you know this defendant?

Mrs. MAY: No, sir; I do not.

Mr. COOPER: Do you know Mr. Weir or Mr. Butcher, his counsel?

Mrs. MAY: Only seeing them here in the courtroom.

Mr. COOPER: Mrs. May, do you have any such conscientious opinions against the imposition of the death sentence that would preclude you from returning a verdict of guilty in this case where the sentence imposed by law may be that of death?

Mrs. MAY: No, I haven't.

Mr. COOPER: Do you know of any reason why you couldn't serve as a fair and impartial juror in this case?

Mrs. MAY: No.

Mr. COOPER: And you can make that statement without any mental reservations whatsoever?

Mrs. MAY: Yes, I can.

Mr. COOPER: Pass the juror for cause.

Mr. BUTCHER: Mrs. May, what is your occupation?

Mrs. MAY: I am a housewife.

Mr. BUTCHER: Is your husband employed here?

Mrs. MAY: My husband is co-owner of the City Fuel Oil Company.

Mr. BUTCHER: You have, I believe, informed Mr. Cooper that you are familiar with some of the purported  
70 facts that you read in the newspapers?

Mrs. MAY: Well, no; I am not familiar with the facts. I recall seeing the headlines, but I don't make it a point to read it all.

Mr. BUTCHER: In this particular case you have not read any more than headlines?

Mrs. MAY: No, I haven't.

Mr. BUTCHER: Well, what about the radio—have you heard broadcasts over the radio?

Mrs. MAY: No, I don't recall hearing anything.

Mr. BUTCHER: Do you have any mental reservations about this case that would prevent you from being a fair and impartial juror?

Mrs. MAY: No, sir.

Mr. BUTCHER: Are you able at this time, putting aside anything you might have read or heard, able to presume the defendant to be innocent until the Government is able to prove him guilty?

Mrs. MAY: Yes.

Mr. BUTCHER: And you are able to carry that conviction until you are convinced otherwise?

Mrs. MAY: Yes, sir, I can.

Mr. BUTCHER: Do you have any special acquaintance with Mr. Cooper or Mr. Moody, who will prosecute this case for the Government?

71 Mrs. MAY: Absolutely none.

Mr. BUTCHER: Pass for cause.

The COURT: The defendant's eighth peremptory challenge.

Mr. WEIR: Excuse Mr. Sherwood.

The COURT: Mr. Sherwood, you are excused to Wednesday morning at 10:00 o'clock.

Clerk of COURT: George F. Mumford.

Mr. COOPER: Mr. Mumford, do you know anything about the facts of this particular case?

Mr. MUMFORD: Just what has been published in the local newspapers.

Mr. COOPER: By virtue of what you have read in the newspapers, have you formed any opinion as to the guilt or innocence of this defendant?

Mr. MUMFORD: No.

Mr. COOPER: Are you acquainted with the defendant?

Mr. MUMFORD: The defendant?

Mr. COOPER: Yes.

Mr. MUMFORD: No, I am not.

Mr. COOPER: Do you know either Mr. Weir or Mr. Butcher, his counsel?

Mr. MUMFORD: I know Mr. Butcher quite well; Mr. Weir slightly.

Mr. COOPER: Is that acquaintance with Mr. Butcher a business or social acquaintance?

72 Mr. MUMFORD: Business largely; social slightly.

Mr. COOPER: Is there anything about your acquaintance with Mr. Butcher that would influence you in any way in any verdict you might be called upon to render if selected as a juror in this case?

Mr. MUMFORD: No.

Mr. COOPER: Do you know of any reason whatever why you couldn't serve as a fair and impartial juror, Mr. Mumford?

Mr. MUMFORD: No.

Mr. COOPER: Do you have such conscientious opinions against the imposition of the death sentence as would preclude you from returning a verdict of guilty in this case where the penalty prescribed by law may be that of death?

Mr. MUMFORD: No.

Mr. COOPER: Pass the juror for cause.

Mr. BUTCHER: Mr. Mumford, I believe you stated that you had read articles and details, purported facts and details, as appeared in the local press?

Mr. MUMFORD: Yes.



Mr. BUTCHER: And did the reading of those create any impression upon your mind as to the guilt or innocence of the defendant?

Mr. MUMFORD: Well, if it did, I would be able to cast it aside and listen to the evidence.

73 Mr. BUTCHER: I believe your answer was it did not?

Mr. MUMFORD: It did not.

Mr. BUTCHER: And at the present time you have no mental reservation or feeling or passion or emotion about this case that would affect your deliberation as a juror?

Mr. MUMFORD: None.

Mr. BUTCHER: Mr. Mumford, you have had jury experience in the past, have you not?

Mr. MUMFORD: Yes.

Mr. BUTCHER: Are you able to presume the defendant to be innocent until the Government has proved him otherwise?

Mr. MUMFORD: Yes.

Mr. BUTCHER: And you can do that in this case?

Mr. MUMFORD: Yes.

Mr. BUTCHER: Pass the juror for cause.

The COURT: Plaintiff's second peremptory challenge.

Mr. COOPER: We will waive, your Honor.

The COURT: The defendant's ninth peremptory challenge.

Mr. WEIR: Excuse Mrs. May.

The COURT: Mrs. May, you are excused to Wednesday morning at 10:00 o'clock.

Clerk of COURT: Edward Nightingale.

Mr. COOPER: Mr. Nightingale, do you know anything about the facts in this particular case?

74 Mr. NIGHTINGALE: Nothing, only what I read in the papers.

Mr. COOPER: By virtue of what you read in the papers, did you form any opinion as to the guilt or innocence of this defendant?

Mr. NIGHTINGALE: I did not.

Mr. COOPER: Are you acquainted with the defendant?

Mr. NIGHTINGALE: No.

Mr. COOPER: Do you know either Mr. Weir or Mr. Butcher, his counsel.

Mr. NIGHTINGALE: Just by sight.

Mr. COOPER: Mr. Nightingale, do you have any such conscientious opinions against the imposition of the death sen-

tence that would preclude you from returning a verdict of guilty in this case if the sentence imposed by law may be that of death?

Mr. NIGHTINGALE: No.

Mr. COOPER: Do you know of any reason whatsoever why you couldn't serve as a fair and impartial juror in this case?

Mr. NIGHTINGALE: No.

Mr. COOPER: And you can make that statement without any mental reservation whatever?

Mr. NIGHTINGALE: Yes.

Mr. COOPER: Pass the juror for cause.

Mr. WEIR: Mr. Nightingale, you stated you have read articles in the paper about this case?

75 Mr. NIGHTINGALE: Yes.

Mr. WEIR: In reading those, would you say, having read all the things you did read in the papers, would it make you tend toward one side of the case or the other?

Mr. NIGHTINGALE: No.

Mr. WEIR: Your mind is perfectly free at the present time and will remain so until the evidence is put in and then you will decide?

Mr. NIGHTINGALE: Correct.

Mr. WEIR: If the prosecution fails to prove the case beyond a reasonable doubt, will you bring in a verdict of not guilty?

Mr. NIGHTINGALE: Yes.

Mr. WEIR: You understand the theory of reasonable doubt?

Mr. NIGHTINGALE: I do.

Mr. WEIR: Would you tell me where you are employed?

Mr. NIGHTINGALE: At Fort Richardson.

Mr. WEIR: What is your activation out there?

Mr. NIGHTINGALE: Machinist.

Mr. WEIR: Pass the juror for cause.

The COURT: Plaintiff's second peremptory challenge.

Mr. COOPER: We will waive.

The COURT: Defendant's tenth peremptory challenge.

Mr. WEIR: Excuse Mr. Swanson.

76 The COURT: Mr. Swanson, you are excused to Wednesday morning at 10:00 o'clock.

Clerk of COURT: Bernice L. Kauffman.

The COURT: The Court will take a recess at this point. Ladies and gentlemen of the jury, although you are only tentatively selected, it is made the Court's duty to ad-

monish the jury not to talk about the case with anyone, nor among yourselves, nor to permit anyone to talk with you about the case. You have heard this admonition given and reiterated many times, I am sure.

WHEREUPON Court recessed until 2:00 o'clock p. m., December 12, 1949, reconvening as per recess with all parties present as heretofore and the jury all present in the box: whereupon the trial proceeded as follows:

The COURT: You may examine the juror Kauffman.

Mr. COOPER: Thank you, your Honor. Mrs. Kauffman, I believe you have had previous jury experience?

Mrs. KAUFFMAN: Yes, sir.

Mr. COOPER: Now, Mrs. Kauffman, do you know anything about the facts in this particular case?

Mrs. KAUFFMAN: Only what I read in the paper.

Mr. COOPER: By virtue of what you have read in the paper, did you form any opinion as to the guilt or innocence of the defendant?

Mrs. KAUFFMAN: No, I don't suppose I did at the time.

77 Mr. COOPER: Do you still entertain any opinion as to his guilt or innocence?

Mrs. KAUFFMAN: Not definitely.

Mr. COOPER: Did you say "not definitely"?

Mrs. KAUFFMAN: Yes, sir.

Mr. COOPER: And you feel that you are in a position at the present time, as you sit there in the jury box, to indulge in a presumption of innocence as far as the defendant is concerned until the Government proves him guilty by evidence adduced here in court?

Mrs. KAUFFMAN: Definitely.

Mr. COOPER: Are you acquainted with the defendant?

Mrs. KAUFFMAN: No, sir.

Mr. COOPER: Do you know Mr. Weir or Mr. Butcher, his counsel?

Mrs. KAUFFMAN: Mr. Weir.

Mr. COOPER: Is that a social acquaintance?

Mrs. KAUFFMAN: Yes, sir.

Mr. COOPER: You visit with each other in each other's homes?

Mrs. KAUFFMAN: He and his wife have been in our home.

Mr. COOPER: Has this case been discussed in your various visits with each other?

Mrs. KAUFFMAN: No, sir, we haven't visited since the case came up.

78 Mr. COOPER: Now, Mrs. Kauffman, do you feel that the relationship existing between your family and Mr. Weir's would influence you in any way in any verdict you might be called upon to render in this case?

Mrs. KAUFFMAN: Definitely not.

Mr. COOPER: Do you have any such conscientious opinions against the imposition of the death sentence as would preclude you from returning a verdict of guilty in this case where the penalty imposed by law may be that of death?

Mrs. KAUFFMAN: No, sir.

Mr. COOPER: Do you know of any reason whatsoever why you couldn't serve as a fair and impartial juror in this case?

Mrs. KAUFFMAN: No, sir.

Mr. COOPER: And you can make that statement without any mental reservation whatsoever?

Mrs. KAUFFMAN: Yes, sir.

Mr. COOPER: Pass the juror for cause.

Mr. BUTCHER: Mrs. Kauffman, what is your occupation?

Mrs. KAUFFMAN: Housewife.

Mr. BUTCHER: Your husband is employed in the Anchorage area?

Mrs. KAUFFMAN: At Fort Richardson.

Mr. BUTCHER: What does he do?

Mrs. KAUFFMAN: He is in the department of the Post Exchange.

79 Mr. BUTCHER: Department of the Post Exchange?

Mrs. KAUFFMAN: Yes.

Mr. BUTCHER: Is that a military position or civilian?

Mrs. KAUFFMAN: Civilian.

Mr. BUTCHER: What is that?

Mrs. KAUFFMAN: Civilian.

Mr. BUTCHER: Do you know if your husband is acquainted with Mr. Carignan?

Mrs. KAUFFMAN: No—I know that he isn't.

Mr. BUTCHER: You know that he isn't. Have you discussed this case with your husband?

Mrs. KAUFFMAN: Well, just reading the papers.

Mr. BUTCHER: You have discussed it with your husband as you were reading the papers?

Mrs. KAUFFMAN: Yes, sir.

Mr. BUTCHER: Has any opinion been expressed as the result of reading these newspapers, between you and your husband?

Mrs. KAUFFMAN: Not that I remember.

Mr. KAUFFMAN: You stated, Mrs. Kauffman, that you



formed an opinion but it was not, perhaps, a definite opinion. Will you explain what you mean by not "definitely" when you answered Mr. Cooper's question?

Mrs. KAUFFMAN: Well, I didn't have any different opinion than the average citizen who read the papers at the time.

Mr. BUTCHER: Could you tell us what that opinion was?

The COURT: I think the witness should not be required to disclose the opinion any further than to answer whether she had an opinion concerning the guilt or innocence.

Mr. BUTCHER: Did you have an opinion as to the guilt or innocence of the defendant, Mr. Carignan?

Mrs. KAUFFMAN: Well, yes, sir; I did.

Mr. BUTCHER: And have you changed that opinion so that at the present time you do not have that opinion? Do you still have that same opinion?

Mrs. KAUFFMAN: Well, I don't know enough about it to be sure.

Mr. BUTCHER: Well, at this time, in your heart and mind, are you able to presume that Mr. Carignan is innocent of this charge made against him?

Mrs. KAUFFMAN: I wouldn't say that he is either innocent or guilty. I don't have an opinion either way.

Mr. BUTCHER: You don't have an opinion either way. You are positive that you do not have an opinion of any kind, as you sit in the jury box at this time, as to his guilt or innocence?

Mrs. KAUFFMAN: No.

Mr. BUTCHER: Then you have been able to remove, haven't you, any opinion that you might have formed before, as the result of reading the newspapers and conversations with your husband?

Mrs. KAUFFMAN: I think that is a little difficult to decide.

Mr. BUTCHER: Maybe I can ask you another question, Mrs. Kauffman. If you were—we will presume—on trial, would you feel that a person of your convictions at the present time would be a fair and impartial juror?

The COURT: That should embrace the converse of the proposition. If you were on trial, or you were representing the prosecution, would you be willing to have one in your frame of mind sit as a juror?

Mrs. KAUFFMAN: Yes, sir.

Mr. BUTCHER: You have no mental reservation, then, at this time, that would affect your deliberations as a juror?

Mrs. KAUFFMAN: No, sir.

Mr. BUTCHER: Well, your Honor, this juror has answered the question as to the presumption of innocence that she has at the present time no presumption of his innocence and neither does she have a presumption of his guilt. On the ground that the defendant is presumed to be innocent and should be presumed to be innocent until he is proved guilty, I believe that this witness should be excused on the grounds of bias.

The COURT: Well, Mrs. Kauffman, there is a rule of law that must be given effect in criminal cases, that the defendant is presumed to be innocent until the presumption is overcome by evidence beyond a reasonable doubt. Now, can you give effect to that presumption or would you be unable to give it any effect?

Mrs. KAUFFMAN: Well, I understood that when I served on the previous case, and I could handle that in the same manner. I understand that thoroughly.

The COURT: It would seem that there must be some misunderstanding or something. She answers that she can give it effect.

Mr. BUTCHER: Well, it isn't a question, your Honor, at least from my point of view, it isn't what she can give effect as to her present disposition if she can't presume him to be innocent. If she can do it in theory and not actually, that wouldn't count. It is what she can actually do.

The COURT: Well, you may question her some more for that purpose, if you wish.

Mr. BUTCHER: Mrs. Kauffman, you understand when a person is indicted by the Grand Jury that a charge is levied against him which must be proved, do you not?

Mrs. KAUFFMAN: Yes, sir. I have served on the Grand Jury and I understand that, but perhaps I misunderstood your questions. I stated that if I had formed an opinion at the time the crime was committed and the papers were read—but I understand the law, that he is entitled to be proven guilty.

83 Mr. BUTCHER: Well, it isn't so much what you understand, but whether you have been able to remove that opinion that you formed previously so that now you have no opinion whatever. Have you been able to remove that opinion from your mind?

Mrs. KAUFFMAN: Yes, sir.

Mr. BUTCHER: You have?

Mrs. KAUFFMAN: I guess so.

Mr. BUTCHER: Well, do you know that you have?

Mrs. KAUFFMAN: Yes, sir.

Mr. BUTCHER: You know that you have removed that opinion?

Mrs. KAUFFMAN: Yes, sir.

Mr. BUTCHER: And you are then, in answer to this question, able to presume that Mr. Carignan is innocent of the crime charged against him until the Government proves him guilty?

Mrs. KAUFFMAN: Yes, sir.

Mr. BUTCHER: You have that presumption now?

Mrs. KAUFFMAN: Yes, sir.

Mr. BUTCHER: And it is going to take evidence to change that presumption; is that correct?

Mrs. KAUFFMAN: Yes, sir.

Mr. BUTCHER: Your Honor, I still feel that if she formed an opinion and that she still understands, because she  
84 served on previous juries and on the Grand Jury, what this question of presumption is all about, that she is sufficiently biased to be unsuitable in this case as a juror and I ask that she be excused.

The COURT: Well, Mrs. Kauffman, your answers haven't been entirely consistent. Now, it makes no difference whether you entertained an opinion at some time in the past or even up to the time you entered the jury box if you can lay it aside, but of course you must be certain of your ability to lay it aside and not to consider it, and it is impossible, of course, for counsel to determine your exact frame of mind except from your answers. Now, are you in any doubt as to your ability to be a fair and impartial juror here, or have you any opinion or impression, even though it may not be very fixed or settled, that would influence you in arriving at a verdict?

Mrs. KAUFFMAN: No, sir; I don't have any ideas that would prevent me from being impartial.

The COURT: Do you wish to examine her further?

Mr. BUTCHER: No, your Honor. I still request that she be excused and your Honor may rule.

The COURT: Well, in view of her answers, why I think the challenge will have to be overruled.

Mr. BUTCHER: May I have an exception?

The COURT: It is the plaintiff's second peremptory challenge.

85 Mr. COOPER: We will waive, your Honor.

The COURT: The defendant's eleventh peremptory challenge.

Mr. BUTCHER: We will ask that Mrs. Kauffman be excused.

The COURT: Mrs. Kauffman, you are excused to 10:00 o'clock Wednesday morning.

Clerk of COURT: Arthur W. Braendel.

Mr. COOPER: Mr. Braendel, you have had previous jury experience?

Mr. BRAENDEL: Yes, sir.

Mr. COOPER: Do you know anything about the facts of this particular case?

Mr. BRAENDEL: No, I do not.

Mr. COOPER: Are you acquainted with the defendant, Mr. Carignan?

Mr. BRAENDEL: No, I am not.

Mr. COOPER: Do you know either Mr. Weir or Mr. Butcher, his counsel?

Mr. BRAENDEL: I know Mr. Weir.

Mr. COOPER: What is the extent of your acquaintance—casual?

Mr. BRAENDEL: Well, betwixt and between. I had him do some work for me and I was introduced to him through mutual friends.

86 Mr. COOPER: Does the relationship of attorney and client now exist between yourself and Mr. Weir?

Mr. BRAENDEL: Not now.

Mr. COOPER: The fact that he has done legal work for you in the past, that fact alone wouldn't influence you in any verdict you might be called upon to render in this case, would it?

Mr. BRAENDEL: No, sir.

Mr. COOPER: You would determine this case solely on the evidence given here in court and in accordance with the Court's instructions, is that right, Mr. Braendel?

Mr. BRAENDEL: That is right.

Mr. COOPER: Now, Mr. Braendel, do you have any such conscientious opinions against the imposition of the death penalty as would preclude you from returning a verdict of guilty if the penalty imposed by law in this case may be that of death?

Mr. BRAENDEL: No, I do not.

Mr. COOPER: Do you know of any reason whatsoever why you could not serve as a fair and impartial juror in this case?

Mr. BRAENDEL: No, sir.

Mr. COOPER: And you can make that statement without any mental reservations whatsoever?

Mr. BRAENDEL: That is right.

Mr. COOPER: We pass the juror for cause.



87 Mr. WEIR: Mr. Braendel, how long have you lived in this vicinity?

Mr. BRAENDEL: Since February, 1946.

Mr. WEIR: Do you recall having noticed anything of this case in the newspaper?

Mr. BRAENDEL: I have; yes.

Mr. WEIR: Is that just recently or—

Mr. BRAENDEL: No, the last time was when the first discovery was made and the investigation was going on. I didn't read it very much, I just noticed it was going on. I saw the articles. It didn't make an impression on me at the time the crime was committed.

Mr. WEIR: Then you did follow the newspapers?

Mr. BRAENDEL: I did; yes.

Mr. WEIR: It didn't—or you didn't form any opinions, or rather you don't have any opinion now?

Mr. BRAENDEL: No, I don't.

Mr. WEIR: Do you belong to the Little Theater Group here?

Mr. BRAENDEL: No, sir.

Mr. WEIR: Do you have anything to do with it?

Mr. BRAENDEL: Not any more. I used to belong to it. I joined it—in fact, I was probably one of the earliest members. Once the Anchorage Symphony started I spent most of my time with that and I gradually stopped being  
88 active in the Little Theater group. I didn't have time for both.

Mr. WEIR: At the time you were active in the Little Theater, did you know Mr. Cooper?

Mr. BRAENDEL: Yes, I met him.

Mr. WEIR: What was that relationship?

Mr. BRAENDEL: Just casual; I knew who he was and he knew who I was and that is about all it amounted to.

Mr. WEIR: That relationship wouldn't tend to make you lean toward the prosecution's side of the case?

Mr. BRAENDEL: Not any more than the defense. In fact, a relation with any lawyer, whether prosecution or defense, wouldn't make any difference, justice transcends all that. You can't very well judge on the basis of people not on trial. I mean it is ridiculous.

Mr. WEIR: Mr. Braendel, did you sit in on the prior case concerning Mr. Carignan?

Mr. BRAENDEL: I served on that trial; yes.

Mr. WEIR: By reason of that case, would that give you any feeling towards or against Mr. Carignan in any way?

Mr. BRAENDEL: Well, I spent a lot of time since then thinking of the implications of that, I mean as to laying aside any ideas or notions I had concerning one case when you have another case; and I finally decided I would just have to—if I were called on the jury—to put aside any matters from the previous case and assume I knew nothing about it, and I think I can do that.

89 Mr. WEIR: You feel then, as you sit there now, that you can throw out all that you know and all the thinking you had to do to reach that decision?

Mr. BRAENDEL: That is right.

Mr. WEIR: Pass the juror for cause.

The COURT: Plaintiff's second peremptory challenge.

Mr. COOPER: May I have a moment, your Honor? We waive, your Honor.

The COURT: The defendant's twelfth peremptory challenge.

Mr. WEIR: Excuse Mr. Braendel.

The COURT: Mr. Braendel, you are excused to Wednesday morning at 10:00 o'clock.

Clerk of COURT: Bonnie Martin.

Mr. COOPER: Pardon me, is it Miss or Mrs. Martin?

Miss MARTIN: Miss.

Mr. COOPER: Miss Martin, I believe you have had previous jury experience?

Miss MARTIN: That is right.

Mr. COOPER: And you understand your responsibilities in general as a juror?

Miss MARTIN: Yes, sir.

Mr. COOPER: Do you know anything about the facts in this particular case?

90 Miss MARTIN: No; I have heard it discussed.

Mr. COOPER: Have you heard it discussed by persons who purported to know the facts?

Miss MARTIN: I wouldn't say so.

Mr. COOPER: And from discussions that you may have heard, have you formed any opinion as to the guilt or innocence of the defendant?

Miss MARTIN: No, sir.

Mr. COOPER: Are you acquainted with the defendant?

Miss MARTIN: No.

Mr. COOPER: Do you know Mr. Butcher and Mr. Weir, his counsel?

Miss MARTIN: No.

Mr. COOPER: Miss Martin, do you have any such conscientious opinions against the imposition of the death sentence as would preclude you from returning a verdict of guilty in this case where the penalty prescribed by law may be that of death?

Miss MARTIN: No, sir.

Mr. COOPER: Do you know of any reason whatsoever why you couldn't serve as a fair and impartial juror in this case?

Miss MARTIN: No, sir.

Mr. COOPER: And you can make that statement without any mental reservation whatsoever?

Miss MARTIN: Yes.

91 Mr. COOPER: We pass the juror for cause.

Mr. BUTCHER: Miss Martin, what is your occupation?

Miss MARTIN: I am a nurse.

Mr. BUTCHER: You are a nurse at the Providence Hospital?

Miss MARTIN: No, at Doctors' Clinic.

Mr. BUTCHER: How long have you been in the Anchorage area?

Miss MARTIN: I was born here.

Mr. BUTCHER: In the discussion you mentioned you had heard, in connection with Mr. Cooper's question, you stated that no one participated in the discussion who purported to know the facts, but did anyone state positive opinions in your presence?

Miss MARTIN: No.

Mr. BUTCHER: And as the result of reading the newspapers and hearing this case perhaps broadcast over the radio and what might have been purported to be facts, you formed no opinion as to the guilt or innocence of Mr. Carignan?

Miss MARTIN: No, sir. I had very little time. I was on twenty-four hour call and I don't believe I ever read the articles in the paper.

Mr. BUTCHER: Do you know of any reason at all why you could not serve as a fair and impartial juror in this case?

Miss MARTIN: No, sir.

92 Mr. BUTCHER: Your mind is open and free from any bias or prejudice?

Miss MARTIN: That is right.

Mr. BUTCHER: And are you able to presume that the defendant is innocent until the Government has proved him guilty?

MISS MARTIN: That is correct.

MR. BUTCHER: And you will so presume until you are convinced otherwise?

MISS MARTIN: Yes, sir.

MR. BUTCHER: Pass for cause.

THE COURT: Plaintiff's second peremptory challenge.

MR. COOPER: We will waive, your Honor.

THE COURT: Defendant's thirteenth peremptory challenge.

MR. BUTCHER: Excuse Mr. Nightingale, please.

THE COURT: Mr. Nightingale, you are excused to Wednesday morning at 10:00 o'clock.

CLERK OF COURT: Tom Kovac.

do

MR. COOPER: Mr. Kovac, / you know anything about the facts in this case? M. K. M.

MR. KOVAC: Not much.

MR. COOPER: What little you do know, what is that based on, from what you may have read in the paper?

MR. KOVAC: I was up fishing at that time, when that happened.

93 MR. COOPER: Have you heard it discussed by anyone who purported to know the facts?

MR. KOVAC: No, I haven't.

MR. COOPER: Do you have any opinion right now as to the guilt or innocence of the defendant?

MR. KOVAC: No, I haven't.

MR. COOPER: Are you acquainted with the defendant?

MR. KOVAC: I know Mr. Butcher; yes,—no, I mean no.

MR. COOPER: You don't know Mr. Carignan, do you Mr. Kovac?

MR. KOVAC: No.

MR. COOPER: And do you know Mr. Weir?

MR. KOVAC: No.

MR. COOPER: I believe you stated that you are acquainted with Mr. Butcher?

MR. KOVAC: Yes, I know Mr. Butcher.

MR. COOPER: And what is the extent of that acquaintance, just casual acquaintance?

MR. KOVAC: He signed some bill for us, for all Alaska Railroad employees, for back pay. That is all. Nothing personal.

MR. COOPER: The fact that Mr. Butcher represented you in that matter, would that influence you one way or another on any verdict that you might be called upon to render in this case, Mr. Kovac?



94 Mr. KOVAC: I should say not.

Mr. COOPER: You would base your verdict entirely on the evidence as given here in court and in accordance with the Court's instructions?

Mr. KOVAC: That is right.

Mr. COOPER: Mr. Kovac, do you have any such conscientious opinions against the imposition of the death sentence as would preclude you from returning a verdict of guilty in this case where the penalty prescribed by law may be that of death?

Mr. KOVAC: No, I have not.

Mr. COOPER: Do you know of any reason whatsoever why you could not be a fair and impartial juror in this case, fair both to the defendant and to the Government?

Mr. KOVAC: None at all.

Mr. COOPER: And you can make that statement without any mental reservation whatever?

Mr. KOVAC: That is right.

Mr. COOPER: We pass the juror for cause.

Mr. WEIR: What is your occupation, Mr. Kovac?

Mr. KOVAC: Commissary, Alaska Railroad.

Mr. WEIR: I believe you stated in answer to one of Mr. Cooper's questions that you were out fishing, I believe, at the time this happened?

Mr. KOVAC: That is right.

Mr. WEIR: And yet you knew about this incident?

95 Mr. KOVAC: I probably, a week or two after, read something about the investigating, that is all.

Mr. WEIR: I see. Well, from what you learned of it and as

M. K. M.

/ you are new, would it or would it not have a tendency to color your thinking as to the evidence as put in here?

Mr. KOVAC: No, it would not.

Mr. WEIR: Your mind is perfectly open and free and you are just waiting, if chosen as a juror, you are just waiting to hear the evidence?

Mr. KOVAC: That is right.

Mr. WEIR: If you are chosen as a juror and if, as you hear the evidence, you make up your mind either for or against the defendant, will you maintain your convictions?

Mr. COOPER: We object.

Mr. WEIR: Unless—

Mr. COOPER: I am sorry.

Mr. WEIR: Unless in discussing in the jury room you see that you are wrong?

Mr. KOVAC: I think I try to see whatever is right.

Mr. WEIR: In other words, you would do exactly what is right, what you feel is right?

Mr. KOVAC: That is right.

Mr. WEIR: Pass the juror for cause.

The COURT: Plaintiff's second peremptory challenge.

Mr. COOPER: We waive, your Honor.

96 The COURT: Defendant's fourteenth peremptory challenge.

Mr. BUTCHER: Excuse Mr. Hosler.

The COURT: Mr. Hosler, you are excused until Wednesday morning at 10:00 o'clock.

Clerk of COURT: Earl H. Matthewson.

Mr. COOPER: Mr. Matthewson, I believe you have had previous jury experience?

Mr. MATTHEWSON: Yes, sir.

Mr. COOPER: And you understand in general your responsibilities as a juror, of course?

Mr. MATTHEWSON: I do.

Mr. COOPER: Do you know anything about the facts of this particular case, Mr. Matthewson?

Mr. MATTHEWSON: Not as to the guilt or innocence of the defendant, I don't know. I have read the newspaper quite a bit about the crime itself.

Mr. COOPER: In having read the articles in the paper, Mr. Matthewson, did you form any opinion as to the guilt or innocence of the defendant?

Mr. MATTHEWSON: No. I can't remember of doing so.

Mr. COOPER: If you did, it didn't impress itself upon your mind to the extent that you now have an opinion; is that correct?

Mr. MATTHEWSON: I don't have an opinion now.

397 Mr. COOPER: Are you acquainted with the defendant, Mr. Carignan?

Mr. MATTHEWSON: No, I am not. I don't remember of ever seeing him except in court.

Mr. COOPER: Do you know Mr. Weir or Mr. Butcher, his counsel?

Mr. MATTHEWSON: I believe I have seen them both in court, and that is the extent of it.

Mr. COOPER: Mr. Matthewson, do you have any such conscientious opinions against the imposition of the death penalty as would preclude you from returning a verdict of guilty in this case where the penalty prescribed by law may be that of death?

Mr. MATTHEWSON: No, I don't.

Mr. COOPER: Do you know of any reason whatsoever why you couldn't serve as a fair and impartial juror in this case?

Mr. MATTHEWSON: No, I don't.

Mr. COOPER: And you can make that statement without any mental reservation whatsoever?

Mr. MATTHEWSON: Yes, I can.

Mr. COOPER: We pass the juror for cause.

Mr. BUTCHER: What is your occupation?

Mr. MATTHEWSON: I work as a carpenter out at Fort Richardson.

Mr. BUTCHER: Have you been around here for quite a while?

Mr. MATTHEWSON: I have had residence for about eight years in Anchorage.

Mr. BUTCHER: Are you a married man?

Mr. MATTHEWSON: Yes, sir.

Mr. BUTCHER: Have you a family?

Mr. MATTHEWSON: Yes, sir.

Mr. BUTCHER: You live here in the city?

Mr. MATTHEWSON: Yes, sir.

Mr. BUTCHER: You stated in answer to Mr. Cooper's question as to what you read about this case, if you were acquainted with the case, as the result of reading the newspapers, that you were?

Mr. MATTHEWSON: Yes, sir.

Mr. BUTCHER: From reading the newspapers or hearing broadcasts over the radio did you come to any opinion as to the guilt or innocence of Mr. Carignan?

Mr. MATTHEWSON: I don't remember if I did. I don't remember much about Mr. Carignan. Most of my recollection of it was at the time the lady was found, the investigation and quizzing of everybody they could think of—that is the most of it.

Mr. BUTCHER: You don't recall any of the newspaper publicity and radio publicity at the time of the apprehension of the defendant?

Mr. MATTHEWSON: I do remember at the time that he was accused. I don't remember any supposed to be particulars or anything about it.

Mr. BUTCHER: From this information you may have acquired over a period of time, does it affect you in any way as you sit here today as to your attitude towards the defendant?

Mr. MATTHEWSON: None whatever.

Mr. BUTCHER: Your mind is open and free to hear the evidence without any prejudice or bias at all?

Mr. MATTHEWSON: Yes, sir.

Mr. BUTCHER: Are you able, Mr. Matthewson, at this time, to presume that Mr. Carignan is innocent until the Government is able to prove otherwise?

Mr. MATTHEWSON: Yes, I am.

Mr. BUTCHER: Pass the juror for cause.

The COURT: Plaintiff's second peremptory challenge.

Mr. COOPER: Excuse Mr. Matthewson.

The COURT: Mr. Matthewson, you are excused to Wednesday morning at 10:00 o'clock.

Clerk of COURT: Bertha Meier.

Mr. COOPER: It is Mrs. Meier, is that correct?

Mrs. MEIER: Yes.

Mr. COOPER: Mrs. Meier, have you had previous jury experience?

100 Mrs. MEIER: Well, I was called on one and they discharged the jury.

Mr. COOPER: From your having been here in court, I assume that you realize your general responsibilities as a juror in a case of this kind; is that correct?

Mrs. MEIER: Yes, I do.

Mr. COOPER: Do you know anything about the facts of this case?

Mrs. MEIER: Mrs. Showalter was a personal friend of mine.

Mr. COOPER: By virtue of that fact, Mrs. Meier, do you entertain any opinion as to the guilt or innocence of Mr. Carignan?

Mrs. MEIER: Well, I would just rather not—no, I don't know—I believe I do—I don't think I would be a fair juror.

The COURT: I think the juror will have to be excused. You are excused, Mrs. Meier, to Wednesday morning at 10:00 o'clock.

Clerk of COURT: Burton March.

Mr. COOPER: Mr. March, you have had previous jury experience?

Mr. MARCH: Yes, sir.

Mr. COOPER: Do you know anything about the facts of this particular case?

101 Mr. MARCH: No, I do not.

Mr. COOPER: Are you acquainted with the defendant, Mr. Carignan?

Mr. MARCH: No.

Mr. COOPER: Are you acquainted with Mr. Weir or Mr. Butcher, his counsel?



Mr. MARCH: No, I am not.

Mr. COOPER: Mr. March, do you have such conscientious opinions against the imposition of the death penalty as would preclude you from bringing in a verdict of guilty in this case where the penalty prescribed by law may be that of death?

Mr. MARCH: No.

Mr. COOPER: Do you know of any reason whatsoever why you couldn't serve as a fair and impartial juror in this case?

Mr. MARCH: No.

Mr. COOPER: And you can make that statement without any mental reservation whatever?

Mr. MARCH: Yes.

Mr. COOPER: Pass the juror for cause.

Mr. BUTCHER: What is your occupation, Mr. March?

Mr. MARCH: C. A. A.

Mr. BUTCHER: C. A. A. Have you been a resident of the area for some time, have you?

Mr. MARCH: Some time, yes.

Mr. BUTCHER: Are you a family man?

102 Mr. MARCH: No, sir.

Mr. BUTCHER: What are your duties at the C. A. A.?

Mr. MARCH: Storekeeper.

Mr. BUTCHER: You were acquainted, were you not, with the newspaper reports about this case?

Mr. MARCH: Yes, I have read the newspapers.

Mr. BUTCHER: You heard about it over the radio?

Mr. MARCH: Oh, yes; yes, I have heard it on the radio.

Mr. BUTCHER: As the result of hearing it over the radio and reading the newspapers and reading something about the case, stating something about the case which the newspapers reported to be facts, would you say you were uninfluenced by that, as to the guilt or innocence of the defendant?

Mr. MARCH: Well, at the time I might have had an opinion or impression, but being that I was on the jury panel here I have tried to throw it out of my mind and I think that I have been able to do so.

Mr. BUTCHER: You admit that you did form an opinion?

Mr. MARCH: At the time.

Mr. BUTCHER: That you have since removed from your mind as the result of your duty here as a juror?

Mr. MARCH: Yes.

Mr. BUTCHER: And that any prejudice or bias that may have come from that opinion is no longer in existence?

Mr. MARCH: That is right.

103 Mr. BUTCHER: And at this time are you able to presume that Mr. Carignan is innocent?

Mr. MARCH: Yes, sir.

Mr. BUTCHER: And are you able to carry that presumption through this trial until you are convinced otherwise by the testimony that is put on here?

Mr. MARCH: Yes, I would be able to.

Mr. BUTCHER: Pass for cause.

The COURT: Defendant's fifteenth peremptory challenge.

Mr. BUTCHER: Excuse Mr. Hagen.

The COURT: Mr. Hagen, you are excused to Wednesday morning.

Clerk of COURT: Florence Tibbs.

Mr. COOPER: Mrs. Tibbs, have you had previous jury experience this term of court?

Mrs. TIBBS: Yes.

Mr. COOPER: And then you understand your general responsibilities as a juror in this type of case?

Mrs. TIBBS: Yes.

Mr. COOPER: Do you know anything about the facts of this particular case, Mrs. Tibbs?

Mrs. TIBBS: Well, I followed the items in the paper and I have heard it discussed by people.

Mr. COOPER: As the result of having followed it in the paper and hearing it discussed, did you form any  
104 opinion as to the guilt or innocence of this defendant?

Mrs. TIBBS: Well, I might have.

Mr. COOPER: Do you entertain any opinion as to his guilt or innocence at the present time?

Mrs. TIBBS: I am afraid I do.

Mr. COOPER: Is that such a fixed opinion that it would require evidence to overcome it?

Mrs. TIBBS: Yes, it would.

Mr. COOPER: You feel then that you couldn't be a fair and impartial juror in this case?

Mrs. TIBBS: I doubt that I could.

The COURT: It is an opinion that you can't lay aside?

Mrs. TIBBS: I think it is.

The COURT: You are excused until 10:00 o'clock Wednesday morning.

Clerk of COURT: L. W. Hines.

Mr. COOPER: If the Court please, may we approach the bench?

The COURT: Yes.

WHEREUPON respective counsel and the Court Reporter approached the bench out of the hearing of the jury and the following occurred: o

Mr. COOPER: There is just a remote possibility that I might want to use Dr. Hines as a witness in this case. For that reason I feel that he should be excused from the  
105 panel, or from the trial of this particular case.

The COURT: I suppose there is no objection?

Mr. BUTCHER: No objection.

Mr. COOPER: No objection on your part?

Mr. BUTCHER: No objection. o

WHEREUPON respective counsel and the Court Reporter withdrew from the bench and were again within the hearing of the jury, and the trial proceeded as follows:

The COURT: Dr. Hines, there is a possibility ~~that~~ you may be called as a witness, and hence both parties agree that you may be excused. You may be excused until 10:00 o'clock Wednesday morning.

Clerk of COURT: J. D. Peters.

Mr. COOPER: Mr. Peters, I believe you have had previous jury experience?

Mr. PETERS: Yes.

Mr. COOPER: Mr. Peters, do you know anything about the facts of this particular case?

Mr. PETERS: No.

Mr. COOPER: Are you acquainted with Mr. Carignan, the defendant?

Mr. PETERS: No.

Mr. COOPER: Do you know Mr. Weir or Mr. Butcher, his counsel?

Mr. PETERS: A speaking acquaintance with Mr.  
106 Butcher is all.

Mr. COOPER: There is certainly nothing about that that would influence you whatsoever as a juror?

Mr. PETERS: Not a bit.

Mr. COOPER: Do you have any such conscientious opinions against the imposition of the death penalty which would preclude you from returning a verdict of guilty in this case where the penalty prescribed by law may be that of death?

Mr. PETERS: No, sir.

Mr. COOPER: Do you know of any reason whatsoever why you couldn't serve as a fair and impartial juror in this case?

Mr. PETERS: No.

Mr. COOPER: And you can make that statement without any mental reservation whatsoever?

Mr. PETERS: Yes.

Mr. COOPER: Pass the juror for cause.

Mr. BUTCHER: Mr. Peters, what is your occupation?

Mr. PETERS: Manager of the automotive department, N. C. Company.

Mr. BUTCHER: And you are aware, are you not, of the articles that appeared in the newspaper and broadcasts over the radio about this case?

Mr. PETERS: I am aware of the articles in the paper, but I don't know as I have heard a word said about it on the radio.

107 Mr. BUTCHER: As the result of reading those articles, did you form any impression as to the guilt or innocence of the defendant?

Mr. PETERS: I am sorry, but I didn't read the articles, merely the headlines. I ordinarily don't read the articles.

Mr. BUTCHER: What was the effect of the headlines so far as your disposition towards this case is concerned?

The COURT: Well, I think that that falls within the Court's previous ruling. It is not what effect or what initial effect was made upon his mind by some fact or event or occurrence, it is his state of mind at the present time.

Mr. BUTCHER: Did the reading of those headlines and articles in the newspaper effect you in any way so that at this time, as you sit here in the jury box, you have some opinion, however vague, as to the guilt or innocence of Mr. Carignan?

Mr. PETERS: No.

Mr. BUTCHER: You have none whatever?

Mr. PETERS: No.

Mr. BUTCHER: You have an open mind on the subject?

Mr. PETERS: Yes, sir.

Mr. BUTCHER: Do you know of any reason at all why you couldn't be a fair and impartial juror?

Mr. PETERS: No.

Mr. BUTCHER: Are you aware of the fact that I, as attorney, represent a client and have filed a suit against the N. C. Company automotive department, of which you are a part?

Mr. PETERS: No, I didn't know that.

Mr. BUTCHER: You didn't know that. Would that influence you if you were to find that out?

Mr. PETERS: No, it wouldn't.

Mr. BUTCHER: Pass for cause.



The COURT: Plaintiff's third peremptory challenge.

Mr. COOPER: We will waive, your Honor.

The COURT: Defendant's sixteenth peremptory challenge.

Mr. BUTCHER: Excuse Mr. March.

The COURT: Mr. March, you are excused until 10:00 o'clock Wednesday morning.

Clerk of COURT: Paul H. Nelms.

Mr. COOPER: Mr. Nelms, have you had previous jury experience?

Mr. NELMS: Yes, sir.

Mr. COOPER: You understand your general responsibilities as a juror in a case of this kind?

Mr. NELMS: Yes, sir.

Mr. COOPER: Are you acquainted with the defendant, Mr. Carignan?

Mr. NELMS: No, sir.

Mr. COOPER: Do you know either Mr. Weir or Mr. Butcher, his attorneys?

Mr. NELMS: No, sir.

109. Mr. COOPER: Do you know anything about the facts of this particular case?

Mr. NELMS: No, sir.

Mr. COOPER: Mr. Nelms, do you have any such conscientious opinions against the imposition of the death sentence as would preclude you from returning a verdict of guilty in this case where the penalty prescribed by law may be that of death?

Mr. NELMS: No, sir.

Mr. COOPER: Do you know of any reason whatsoever why you couldn't serve as a fair and impartial juror in this case?

Mr. NELMS: No, sir.

Mr. COOPER: And you can make that statement without any mental reservation whatsoever?

Mr. NELMS: Yes, sir.

Mr. COOPER: Pass the juror for cause.

Mr. WEIR: Mr. Nelms, at any time have you noticed any items in the paper about this case?

Mr. NELMS: I believe I have; yes, sir.

Mr. WEIR: Did you read the items?

Mr. NELMS: I may have read the items; yes, sir.

Mr. WEIR: So far as reading those items, do they, as you sit in the box now, do you have any feeling about it now one way or the other?

Mr. NELMS: No, sir.

Mr. WEIR: Did you ever discuss the case with any one who purported to know the facts?

Mr. NELMS: No, sir.

Mr. WEIR: Or did you discuss it in ordinary conversation?

Mr. NELMS: I believe in our family life we may have mentioned the articles in the paper, as we do from time to time in our family life, we discuss current events, just casually.

Mr. WEIR: You didn't reach any conclusion that would carry over to now as to your present state as you sit in the box?

Mr. NELMS: No, sir.

Mr. WEIR: What was your occupation, Mr. Nelms?

Mr. NELMS: I was six and one-half years with the Civil Aeronautics Administration and two years at Fort Richardson as contract negotiator.

Mr. WEIR: That is, you are contract negotiator now?

Mr. NELMS: No, sir, I have not been working for some time.

Mr. WEIR: Pass the juror for cause.

The COURT: Plaintiff's third peremptory challenge.

Mr. COOPER: We waive, your Honor.

The COURT: Defendant's seventeenth peremptory challenge.

Mr. BUTCHER: Excuse Mr. Curtis.

The COURT: Mr. Curtis, you are excused until 11 10:00 Wednesday morning.

Clerk of COURT: Fred Moellendorf.

Mr. COOPER: Mr. Moellendorf, I believe you have had previous jury experience?

Mr. MOELLENDORF: Yes, sir.

Mr. COOPER: Do you know anything about the facts of this particular case?

Mr. MOELLENDORF: Yes, I have read all about it.

Mr. COOPER: As the result of what you have read have you formed any opinion as to the guilt or innocence of the defendant?

Mr. MOELLENDORF: No, not from what I have read.

Mr. COOPER: Well, by virtue of anything, have you formed any opinion as to the guilt or innocence of this defendant?

Mr. MOELLENDORF: Yes. I knew Mrs. Showalter real well.

Mr. COOPER: Do you feel that that would influence you?

Mr. MOELLENDORF: It would.

Mr. COOPER: And prevent you from being a fair and impartial juror?

Mr. MOELLENDORF: Yes.

The COURT: Well, you may be excused, Mr. Moellendorf, until 10:00 o'clock Wednesday morning.

Clerk of COURT: Lionel S. Haakenson.

112 Mr. COOPER: Mr. Haakenson, have you had previous jury experience?

Mr. HAAKENSEN: Yes, I have.

Mr. COOPER: During this term of court?

Mr. HAAKENSEN: Yes.

Mr. COOPER: In a criminal or civil case?

Mr. HAAKENSEN: Criminal.

Mr. COOPER: Now, may I ask you a question as to how long you have been in the Territory?

Mr. HAAKENSEN: Since 1937.

Mr. COOPER: What is your business or occupation?

Mr. HAAKENSEN: I am a sheet metal worker. I work for Pioneer Sheet Metal Works.

Mr. COOPER: Now, Mr. Haakenson, do you know anything about this particular case?

Mr. HAAKENSEN: I have read about it and heard about it over the radio.

Mr. COOPER: And as the result of having heard about it over the radio and having read about it in the newspaper, have you formed any opinion as to the guilt or innocence of this defendant?

Mr. HAAKENSEN: Yes, I believe I have.

Mr. COOPER: Is that such a fixed opinion as would require evidence to lay it aside?

Mr. HAAKENSEN: I think it would; yes.

113 Mr. COOPER: You feel, then, in your present frame of mind you could not be a fair and impartial juror in this particular case?

Mr. HAAKENSEN: I don't believe I could.

Mr. COOPER: You feel the opinion that you entertain as to the guilt or innocence of the defendant is such that it would be impossible for you to lay aside and base your verdict entirely on the evidence as given here in court?

Mr. HAAKENSEN: I don't believe I could forget it altogether.

The COURT: What is this opinion based on—newspaper reports, rumors, or talking with someone who knew something about it of personal knowledge?

Mr. HAAKENSEN: Well, newspaper reports I would say.

The COURT: Well, an opinion formed on newspaper re-

ports is not disqualifying, but if you persist in clinging to it, of course, why then it would be a disqualification. Now, you feel that you cannot lay that aside?

Mr. HAAKENSEN: I do.

The COURT: You are excused then until 10:00 o'clock Wednesday morning.

Clerk of COURT: J. M. McDonald.

Mr. COOPER: Mr. McDonald, do you know anything about the facts of this particular case?

Mr. McDONALD: I don't believe I do.

114 Mr. COOPER: Are you acquainted with the defendant, Mr. Carignan?

Mr. McDONALD: No.

Mr. COOPER: Do you know either Mr. Weir or Mr. Butcher, his counsel?

Mr. McDONALD: I do not.

Mr. COOPER: Mr. McDonald, do you have any such conscientious opinions against the imposition of the death sentence as would preclude you from bringing in a verdict of guilty in this case where the penalty provided by law may be that of death?

Mr. McDONALD: I have not.

Mr. COOPER: Do you know of any reason, Mr. McDonald, why you couldn't serve as a fair and impartial juror in this case, being fair both to the defendant and to the Government?

Mr. McDONALD: No.

Mr. COOPER: And you can make that statement without any mental reservation whatsoever?

Mr. McDONALD: Absolutely.

Mr. COOPER: Thank you, Mr. McDonald. We pass the juror for cause.

Mr. BUTCHER: Mr. McDonald, you are an old-time resident of Talkeetna, is that correct?

Mr. McDONALD: That is correct.

Mr. BUTCHER: Is that correct?

115 Mr. McDONALD: Yes, sir.

Mr. BUTCHER: How long have you been in Anchorage on this particular visit?

Mr. McDONALD: About three months.

Mr. BUTCHER: You came down to perform jury service, did you?

Mr. McDONALD: Yes.

Mr. BUTCHER: While you were up in Talkeetna were you aware of any newspaper or radio comments about this particular case which purported to give the facts?



Mr. McDONALD: Not to my recollection.

Mr. BUTCHER: Mr. McDonald, do you have any opinion about this case as to the innocence or guilt of Mr. Carignan?

Mr. McDONALD: I have not.

Mr. BUTCHER: Are you able to retain an open mind until your mind is changed by evidence?

Mr. McDONALD: I don't know anything about the case.

Mr. BUTCHER: Are you able to presume that Mr. Carignan is innocent until the Government, Mr. Moody and Mr. Cooper, have presented evidence sufficient to convince you that he is guilty?

Mr. McDONALD: Yes, sir.

Mr. BUTCHER: And if they fail to convince you, you would return a verdict of not guilty, is that correct?

Mr. McDONALD: Yes, sir.

116 Mr. BUTCHER: Pass for cause.

The COURT: Plaintiff's third peremptory challenge.

Mr. COOPER: We waive, your Honor.

The COURT: Defendant's eighteenth peremptory challenge.

Mr. BUTCHER: Excuse Mr. Peters.

The COURT: Mr. Peters, you are excused until 10:00 o'clock next Wednesday morning.

Clerk of COURT: Mrs. E. W. Rowell.

Mr. COOPER: Mrs. Rowell, I believe you have had previous jury experience?

Mrs. ROWELL: Yes.

Mr. COOPER: Do you know anything about the facts of this particular case?

Mrs. ROWELL: No, I don't.

Mr. COOPER: Do you know Mr. Carignan, the defendant in this case?

Mrs. ROWELL: No, I don't.

Mr. COOPER: Or Mr. Weir or Mr. Butcher, his counsel?

Mrs. ROWELL: No, I don't.

Mr. COOPER: Mrs. Rowell, do you entertain any such conscientious opinions against the imposition of the death sentence as would preclude you from returning a verdict of guilty in this case?

Mrs. ROWELL: No, sir.

117 Mr. COOPER: Where the sentence prescribed by law may be that of death?

Mrs. ROWELL: No, sir.

Mr. COOPER: Do you know of any reason whatsoever why you couldn't serve as a fair and impartial juror in this case?

Mrs. ROWELL: No, I don't.

Mr. COOPER: And you can make that statement without any mental reservation whatsoever?

Mrs. ROWELL: Yes, sir.

Mr. COOPER: Thank you, Mrs. Rowell. We pass the juror for cause.

Mr. BUTCHER: Mrs. Rowell, what is your occupation?

Mrs. ROWELL: Housewife.

Mr. BUTCHER: Your husband is employed at Anchorage?

Mrs. ROWELL: Yes, sir.

Mr. BUTCHER: What does he do?

Mrs. ROWELL: He is with the Alaska Plumbing and Heating.

Mr. BUTCHER: Alaska Plumbing and Heating. And during the course of the last few months have you had occasion to hear radio comment and read newspaper reports about this case?

Mrs. ROWELL: I have read newspaper reports; yes.

Mr. BUTCHER: Have these newspaper reports and radio comments been discussed at your home, between you and your husband?

118 Mrs. ROWELL: I don't believe so.

Mr. BUTCHER: You don't recall?

Mrs. ROWELL: No, I don't.

Mr. BUTCHER: And did the effect of those newspaper reports and radio comments have any effect upon your mind as to your present disposition towards the defendant?

Mrs. ROWELL: None whatsoever.

Mr. BUTCHER: You have no feeling of emotion or prejudice or bias in your mind or heart towards Mr. Garignan?

Mrs. ROWELL: I have not.

Mr. BUTCHER: You are able to presume he is innocent until the Government, if and when they do, prove him guilty?

Mrs. ROWELL: Yes, that is right.

Mr. BUTCHER: And if they fail to present sufficient evidence to prove him guilty, would you return a verdict of not guilty?

Mrs. ROWELL: Absolutely.

Mr. BUTCHER: Pass for cause.

The COURT: Plaintiff's third peremptory challenge.

Mr. COOPER: We waive, your Honor.

The COURT: Defendant's nineteenth peremptory challenge.

Mr. BUTCHER: Excuse Mr. McDonald.

The COURT: Mr. McDonald, you are excused until 10:00 o'clock Wednesday morning.

119 Clerk of COURT: Frank J. Riley.

Mr. COOPER: Mr. Riley, do you know anything about the facts of this case?

Mr. RILEY: No, I do not.

Mr. COOPER: Are you acquainted with the defendant, Mr. Carignan?

Mr. RILEY: No, I am not.

Mr. COOPER: Do you know either Mr. Weir or Mr. Butcher, his attorneys?

Mr. RILEY: Just to say hello on the street, is all.

Mr. COOPER: Mr. Riley, do you entertain any such conscientious opinions against the imposition of the death penalty which would preclude you from bringing in a verdict of guilty in this case where the penalty prescribed by law may be that of death?

Mr. RILEY: No, I do not.

Mr. COOPER: Do you know of any reason whatsoever why you couldn't serve as a fair and impartial juror in this case?

Mr. RILEY: No, I don't.

Mr. COOPER: And you can make that statement without any mental reservation whatsoever?

Mr. RILEY: Yes, I can.

Mr. COOPER: Pass the juror for cause.

120 Mr. WEIR: Mr. Riley, how long have you been in the vicinity of Anchorage?

Mr. RILEY: Five years.

Mr. WEIR: Did you, or have you, at any time, read any newspaper articles or heard any radio broadcasts pertaining to the crime?

Mr. RILEY: Yes, I believe I have read a little bit about it. You can't avoid reading the papers.

Mr. WEIR: From what you read, did you discuss it with anyone at that time?

Mr. RILEY: No, I have not.

Mr. WEIR: Then, as you sit here this afternoon, why you have no feeling brought over from hearing it on the radio or reading it in the papers?

Mr. RILEY: No, I haven't.

Mr. WEIR: You understand the theory that the defendant is presumed to be innocent until proved guilty?

Mr. RILEY: Yes, sir.

Mr. WEIR: What is your occupation, Mr. Riley?

Mr. RILEY: I am a mechanic, Alaska Airlines.

Mr. WEIR: Pass the juror for cause.

The COURT: Plaintiff's third peremptory challenge.

Mr. COOPER: We waive, your Honor.

The COURT: Defendant's twentieth peremptory challenge.

Mr. BUTCHER: Excuse Mrs. Rowell.

121 The COURT: Mrs. Rowell, you are excused until Wednesday morning at 10:00 o'clock.

Clerk of Court: Sam Wood.

Mr. COOPER: Mr. Wood, have you had previous jury experience through this term of court?

Mr. WOOD: Not in the last term.

Mr. COOPER: What was your answer?

Mr. WOOD: Not in Alaska.

Mr. COOPER: What is your business or occupation?

Mr. WOOD: Unemployed.

Mr. COOPER: Do you know anything about the facts of this case?

Mr. WOOD: I do not.

Mr. COOPER: Are you acquainted with Mr. Carignan, the defendant in this case?

Mr. WOOD: I am not, sir.

Mr. COOPER: Do you know Mr. Weir or Mr. Butcher?

Mr. WOOD: I do not.

Mr. COOPER: Mr. Wood, do you have any such conscientious opinions against the imposition of the death sentence in this case as would preclude you from bringing in a verdict of guilty in this case where the penalty provided by law may be that of death?

Mr. WOOD: I have not.

Mr. COOPER: Do you know of any reason at all why you couldn't serve as a fair and impartial juror in this case?

122 Mr. WOOD: None.

Mr. COOPER: And you make that statement without any mental reservation whatsoever?

Mr. WOOD: Definitely.

Mr. COOPER: What is your address, Mr. Wood?

Mr. WOOD: Salvation Army.

Mr. COOPER: Pass the juror for cause.



Mr. BUTCHER: Mr. Wood, how long have you been in the area?

Mr. WOOD: Between six and seven years.

Mr. BUTCHER: What was your occupation?

Mr. WOOD: I worked with the Alaska Railroad.

Mr. BUTCHER: The Alaska Railroad; you are not employed there now?

Mr. WOOD: No—unemployed.

Mr. BUTCHER: Unemployed. Have you been aware of the radio comment or newspaper articles about this?

Mr. WOOD: No, I haven't heard or read anything about it.

Mr. BUTCHER: ~~Nothing at all?~~

Mr. WOOD: Nothing at all.

Mr. BUTCHER: Do you know anything about it at all, apart from radio and newspaper?

Mr. WOOD: Nothing; I have never read or heard anything about it.

123 Mr. BUTCHER: You haven't heard anything about it? You never heard it discussed in your presence?

Mr. WOOD: That is right.

Mr. BUTCHER: You never participated in a discussion?

Mr. WOOD: I haven't heard about it, and never talked to anybody.

Mr. BUTCHER: How long have you been on the present panel?

Mr. WOOD: Just a few days.

Mr. BUTCHER: Recently subpoenaed?

Mr. WOOD: That is right.

Mr. BUTCHER: And do you know of any reason at all, Mr. Wood, why you couldn't be a fair and impartial juror?

Mr. WOOD: None whatever.

Mr. BUTCHER: You are able to approach this case with an open mind?

Mr. WOOD: Definitely.

Mr. BUTCHER: And you are able to presume the defendant is innocent until proved otherwise by competent evidence?

Mr. WOOD: That is right.

Mr. BUTCHER: Pass for cause.

The COURT: Plaintiff's third peremptory challenge.

Mr. COOPER: Excuse Mr. Wood.

The COURT: Mr. Wood, you are excused until Wednesday morning at 10:00 o'clock.

124 Clerk of COURT: Francis J. O'Neill.

Mr. COOPER: Mr. O'Neill, do you know anything about the facts of this case?

Mr. O'NEILL: No, I do not, sir.

Mr. COOPER: Do you know Mr. Carignan, the defendant?

Mr. O'NEILL: No, sir.

Mr. COOPER: Do you know Mr. Butcher or Mr. Weir, his attorneys?

Mr. O'NEILL: I know Mr. Butcher by sight, is all.

Mr. COOPER: Mr. O'Neill, do you have any such conscientious opinions against the imposition of the death penalty which would preclude you from returning a verdict of guilty in this case where the penalty imposed by law be that of death?

Mr. O'NEILL: No, I have not.

Mr. COOPER: Do you know of any reason whatsoever why you could not serve as a fair and impartial juror in this case?

Mr. O'NEILL: No, I do not.

Mr. COOPER: And you can make that statement without any mental reservation whatsoever?

Mr. O'NEILL: Yes.

Mr. COOPER: Pass the juror for cause.

Mr. BUTCHER: What is your occupation, Mr. O'Neill?

Mr. O'NEILL: I am a self-employed merchant.

125 Mr. BUTCHER: You are a self-employed merchant. You are the son of Harry O'Neill, are you not?

Mr. O'NEILL: One of them; yes.

Mr. BUTCHER: You are one of his sons. Have you been aware of this case as the result of reading the newspapers and hearing radio comments?

Mr. O'NEILL: I recall reading it in the paper. I don't especially recall hearing it on the radio.

Mr. BUTCHER: From reading the news articles in the paper and the headlines, did it affect your mind in any way so at the present time you have formed an opinion, however vague, as to the guilt or innocence of Mr. Carignan?

Mr. O'NEILL: No.

Mr. BUTCHER: You have no opinion?

Mr. O'NEILL: I have no opinion.

Mr. BUTCHER: You have no feeling of prejudice or any emotion which might affect your deliberation?

Mr. O'NEILL: No, I have not.

Mr. BUTCHER: If it appeared during the course of the testimony, Mr. O'Neill, that intoxicating liquor had a part in

this case, would it affect your deliberation as a juror in any way whatever?

The COURT: Well, that is also within the Court's ruling that it is improper to ask a juror what the effect of any specific evidence would be on his mind.

126 Mr. BUTCHER: Would you be influenced by anything at all, that you think, at the present time, which might tend to make you anything but a fair and impartial juror?

Mr. O'NEILL: I don't believe so.

Mr. BUTCHER: You don't think so?

Mr. O'NEILL: No, I don't think so.

Mr. BUTCHER: Pass Mr. O'Neill for cause.

The COURT: Government's fourth peremptory as to Mr. O'Neill.

Mr. COOPER: We will waive, your Honor.

The COURT: Proceed to empanel two alternates.

Clerk of COURT: S. E. Shirkey, Herbert C. Lindersmith.

Mr. COOPER: Mr. Shirkey, do you know anything about the facts of this case?

Mr. SHIRKEY: No, I don't.

Mr. COOPER: Are you acquainted with the defendant or either of his counsel?

Mr. SHIRKEY: No, I am not.

Mr. COOPER: Do you have any such conscientious opinions against the imposition of the death penalty as would preclude you from returning a verdict of guilty in this case where the penalty imposed may be that of death?

Mr. SHIRKEY: No, I haven't.

127 Mr. COOPER: Do you know of any reason whatsoever why you couldn't serve as a fair and impartial juror?

Mr. SHIRKEY: No, I do not.

Mr. COOPER: And you can make that statement without any mental reservation whatsoever?

Mr. SHIRKEY: That is right.

Mr. COOPER: Pass the juror for cause.

Mr. WEIR: Mr. Shirkey, have you noticed any items in the newspaper, or comments on the radio, about this case?

Mr. SHIRKEY: Yes, I followed it very closely at the time.

Mr. WEIR: Well, at the present time do you have the same feeling as you did when the case—when you first read about it?

Mr. COOPER: That is objected to, what feelings he may have had.

The COURT: Yes: The only question is whether he formed an opinion as to guilt or innocence at that time which he still retains.

Mr. WEIR: Your Honor, that is what I intended to ask.

The COURT: Well, but a feeling instead of an opinion, as to guilt or innocence, is too indefinite, and is immaterial.

Mr. WEIR: I see. Do you have an opinion now based on what you read at a prior time?

Mr. SHIRKEY: No, I do not.

Mr. WEIR: What is your occupation, Mr. Shirkey?

128 Mr. SHIRKEY: I am employed by the Alaska Airlines.

Mr. WEIR: Pass the juror for cause.

Mr. COOPER: Mr. Lindersmith, do you know anything about the facts of this particular case?

Mr. LINDERSMITH: I don't know the facts. I read the headlines; at the time it occurred I was out of town, though.

Mr. COOPER: From what you may have read in the headlines, did you form any opinion as to the guilt or innocence of the defendant?

Mr. LINDERSMITH: No, sir.

Mr. COOPER: Are you acquainted with the defendant?

Mr. LINDERSMITH: No, sir.

Mr. COOPER: Do you know either Mr. Weir or Mr. Butcher, his counsel?

Mr. LINDERSMITH: No, sir.

Mr. COOPER: Mr. Lindersmith, do you have any such conscientious opinions against the imposition of the death penalty which would preclude you from arriving at a verdict of guilty in this case where the penalty imposed by law may be that of death?

Mr. LINDERSMITH: No, I haven't.

Mr. COOPER: Do you know of any reason whatsoever why you cannot be a fair and impartial juror in this case, fair both to the defense and to the Government?

Mr. LINDERSMITH: No, I haven't any reason.

129 Mr. COOPER: And you can make that statement without any mental reservation whatsoever?

Mr. LINDERSMITH: Yes.

Mr. COOPER: We pass the juror for cause.

Mr. BUTCHER: Pass the juror for cause.

The COURT: The plaintiff's first peremptory as to the alternates.

Mr. COOPER: We waive, your Honor.



The COURT: Defendant's peremptory as to the alternates.

Mr. BUTCHER: We waive our peremptory as to the alternates.

The COURT: You may swear the jury.

WHEREUPON the jury was duly sworn to try the cause.

Mr. BUTCHER: Your Honor, I wonder if we might have a short recess at this time, and also I would like to make a motion and I would like to make the motion in the absence of the jury. It will not take more than one minute to make the motion.

The COURT: During the recess?

Mr. BUTCHER: Yes, during the recess.

The COURT: Ladies and gentlemen of the jury, the Court will now be in recess for ten minutes and you may either retire to the jury room or to the courtroom or to the immediate vicinity and the jurors may retire from the box and the Court will remain in session to hear the motion.

WHEREUPON the jury retired from the courtroom.

*Renewal of Motion for Change of Venue and Denial Thereof*

Mr. BUTCHER: Your Honor, I want to renew my earlier motion on the grounds of impossibility of getting a jury free from prejudice and bias, despite the ostensibly, and perhaps, sincere answers of the jury, to the questions put to them, and also the proximity of the last case on which the defendant was tried, to this one, and in addition to that, the fact that all the members of the panel, with the exception, perhaps, of Mr. Wood, have been present in court during the drawing of the previous jury for Mr. Carignan's case and must have heard and have been affected in some way by the testimony and statement of the prosecution at that time, and by the verdict, and also by the fact that the present panel is chosen entirely from—the present jury is chosen entirely from the previous panel, so that is new matter and of course we make a new motion, challenging the array presently constituted as having been drawn from the panel that participated in the previous case.

The COURT: The motion is denied. I feel, as I think have intimated before, that the character of a crime cannot be added to or can hardly be added to by what somebody else says about it, and so far as the jurors hearing previous reports about the case, you are not in any different position

than if you were starting out with a jury of total strangers, because by the time all the evidence was in, the likelihood is that everything that had been heard by other people through the radio and the press would be placed before this jury in the courtroom. In other words, all the facts about the case, as long as they are admissible, would have to be introduced in evidence and so the position of a jury of strangers would not be unlike that of one that has heard everything before, and since the jurors have all answered that they have no prejudice, no opinion, the Court cannot go behind their answers and try to divine some reasons for their answering as they did answer, or divine some cause for disqualification. The motion is, therefore, denied, and the Court is in recess for ten minutes.

Mr. BUTCHER: May I take an exception, your Honor?

The COURT: Yes.

WHEREUPON Court recessed for ten minutes, reconvening as per recess with all parties present as heretofore and the jury all present in the box, and thereupon Mr. Cooper made the opening statement to the jury in behalf of the Government and Mr. Butcher made the opening statement to the jury in behalf of the defendant; whereupon the trial proceeded as follows:

The COURT: Call your first witness.

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#### GOVERNMENT'S CASE

HENRY A. KEITH, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

#### Direct Examination.

By Mr. COOPER:

Q. Will you state your name, sir?

A. Henry A. Keith.

Q. Where do you reside, Mr. Keith?

A. 119 East Ninth.

Q. Is that where you were residing on the 31st day of July, 1949?

A. It was.

Q. Now, calling your attention to that specific date, had you been uptown in the afternoon or evening of that day?

A. I was up there in the evening.

Q. And approximately what time, if you recall, did you start home?

A. Well, I started home in time to get there about 9:30.

Q. You arrived at your home at approximately 9:30?

A. Approximately.

Q. Now, what route did you take home?

A. I went down through the park until I hit A Street and went right on down A Street.

Q. When you say "the park", you have reference  
133 to the park located over by the baseball park?

A. Yes; I cut through there.

Q. You cut through there?

A. I did.

Q. And you arrived at A Street?

A. A Street; yes, sir.

Q. Now, after having gone through the park, and your arrival at A Street and in that vicinity, did you notice anything out of the ordinary?

A. I never saw a thing out of the ordinary on A Street.

Q. Now, as you went on towards your home then, did anything out of the ordinary occur?

A. Well, I discovered a man and a woman laying in the grass at the side of the road, on the left.

Q. Now, you were proceeding towards Ninth on A. is that correct?

A. Towards Ninth.

Q. And on your left, you say you saw a man and a woman lying in the grass?

A. I did.

Q. Now, can you give us a little better description of that particular incident, Mr. Keith?

A. Well, as I passed by, I stopped and looked over there. He rose up and told me to go on.

Q. Who rose up, Mr. Keith?

A. The man.

134 Q. Now, did you have any further conversation with him?

A. If I did, I told him he had better move.

Q. And did you observe how the man, concerning whom you have spoken, was dressed?

A. Well, he was dressed in a khaki shirt and I believe in trousers a little darker.

Q. Was he wearing a hat or not?

A. No, he had no hat on.

Q. Now, was there anything else a little out of the ordinary about the appearance of the individual?

A. You mean about the description?

Q. Yes.

A. Well, his hair was receding in front. He was sandy haired.

Q. Did he appear to be a fairly large or a small man?

A. Yes, a fairly large man.

Q. Now, I believe you say you saw him laying beside a woman?

A. I did.

Q. Were you able to observe whether or not there was any movement on the part of the woman?

A. No, she was laying absolutely still.

Q. Now, did you notice any other articles of clothing around the roadway at that time?

A. There was a shoe laying in the roadway, a red shoe.

Q. And approximately how far was that from the position of the bodies of these two people?

135 A. Well, the shoe was laying somewheres near in the center of the road, somewheres near the center, and I expect the people was probably laying thirty feet from the road.

Q. Now, did you notice any other persons in that immediate vicinity?

A. Just some children playing in the alley.

Q. And about how many children would you say?

A. I would say there was four or five.

Q. Did you notice whether or not any of them had a bicycle?

A. Yes, one of them had a bicycle.

Q. How far is it from this spot that you have just described, how far is that from the place that you were living at the time?

A. Oh, I imagine it is a half a block.

Q. And you proceeded to walk from there on home?

A. I went on home.

Q. How long would you say that it would require you to walk that distance?

A. You mean from the murder scene to my home?

Q. Yes.

A. It would just take a minute, probably.

Mr. BUTCHER: Your Honor, I object to the answer the witness made as to the "murder scene". There is no proof here that a murder has been committed and the witness referred to the "murder scene" with any evidence



136 that a murder has been committed, and I ask that it be stricken from the record.

The COURT: Well, I assume he is speaking as of the present, or as of a later time, so the motion is denied.

Q. Now, approximately what time did you say it was when you arrived at home?

A. About 9:30.

Q. Now, did you go downtown then the following morning, Mr. Keith?

A. I did. I went to work.

Q. About what time?

A. About 6:00 o'clock.

Q. And on your way downtown, were you at all curious about the incident you witnessed the night before?

A. Well, yes; I went right by there and took a look.

Q. And what did you see upon looking?

A. I saw a naked person laying there, in the nude.

Q. Now, was the naked person that you saw in the same location that you saw these two parties the previous evening?

Mr. BUTCHER: I object to that as leading, your Honor. The witness is competent to tell where he saw the person without being lead by the District Attorney.

The COURT: It is leading.

Q. Where was the body that you saw next morning, with reference to where you had seen these two parties the previous night?

137 A. It was in the same spot.

Q. Now, what did you do when you observed that?

A. I come up town and reported it to the police.

Q. And what happened, following that?

A. They took me back out there, two police officers.

Q. They took you back to this particular scene?

A. They did.

Q. Now, at any later time, Mr. Keith, were you called upon to identify anyone that resembled the person that you saw, the male person in the grass that night?

A. I was taken to the police station and viewed the line-up.

Q. Do you recall how many were in that line-up?

A. There was either four or five, I don't exactly recollect.

Q. Did you pick out some person that appeared to be the person that you saw on this particular occasion?

A. I did.

Q. Do you see anyone in the courtroom today that resembles the party that you saw that night in question?

A. I do.

Q. Will you point him out?

A. He is right over there.

Mr. BUTCHER: Well, now, just a moment, your Honor. The question was, "Did you see anyone that you saw that night, the night in question?" in this line-up, and I think he ought to be asked if he saw anyone whom he saw  
138 at the scene of the incident. He may have seen a great many people that night and his answer wouldn't throw any light on it. Did he see this person where this incident occurred, would be the proper question, and his answer is of no value the way it is at the present time.

Mr. COOPER: That is the question I meant to have answered. Maybe I wasn't too clear on it.

Q. Mr. Keith, do you see anyone in the courtroom who appears to be the person that you saw in the grass with the woman on the night of July 31, 1949?

Mr. BUTCHER: I object to that as leading, your Honor. He can certainly ask what he saw that night, or if there is anyone in the courtroom that resembles that person. The question the District Attorney asked is entirely leading and suggests the answer.

The COURT: Well, it can't be leading when it asks if he sees anyone in the courtroom that he thinks he saw that night. That is not leading. Objection overruled. You may answer.

Q. Will you answer, Mr. Keith? Would you answer the question.

A. Yes, sir. The man is right over there.

Q. Indicating who, Mr. Keith?

A. The man on the end there, with the uniform on.

Q. The man sitting by Mr. Weir, or do you know Mr. Weir?

A. I don't know Mr. Weir.

139 Q. Do you mean starting from Mr. Butcher, the third man over?

A. The third man over.

Q. I believe you stated that you returned to the scene which you have just described, the morning of August 1 with the police?

A. Yes, sir.

Q. Approximately 6:00 in the morning?

A. Approximately, yes.

Q. I would like to show you this photograph, Mr. Keith, and ask you if this appears to be an accurate representation of the immediate vicinity that you have just testified to?

A. Yes, that is the vicinity.

Mr. COOPER: We offer the photograph in evidence.

Mr. BUTCHER: Your Honor, I object to the introduction of this as an exhibit in evidence on the grounds that a proper foundation has not been laid for the introduction in evidence. The witness has simply testified that this was a replica or appeared to be a good reproduction of the scene. If this photograph is admissible in evidence, it ought to be identified as to whether it is actually the scene and who took it, and all the information necessary for introduction of a photograph in evidence under the photographic evidence rule, and none of that has been done in this case, no foundation laid at all. We don't know whether that is a  
140 posed picture or a similar picture or an identical picture, and, for the purpose of evidence, it is not competent.

The COURT: It is not necessary to call the photographer if the witness can say it correctly represents the scene as he saw it at the time. I don't know whether the witness has so answered, however. You may question him.

Q. Does that accurately represent the scene as you saw it, the following morning of August 1, 1949, Mr. Keith?

A. Yes, sir.

The COURT: Objection is overruled, and it may be admitted in evidence and marked Plaintiff's Exhibit No. 1.

Mr. BUTCHER: Your Honor, may I have an automatic exception?

The COURT: Yes.

Mr. BUTCHER: And another thing I overlooked, your Honor, was requesting that all witnesses be excluded from the courtroom, but I don't believe that a statement has been made from the bench to that effect, and I would appreciate it if your Honor would now do so.

The COURT: You have a witness room here, do you?

Mr. COOPER: Yes, your Honor—Room 141.

The COURT: On the request of counsel, all witnesses are excluded from courtroom until called to testify and each party will be required to see that this order is obeyed.

Q. Now, Mr. Keith, do you have a pen?

141 A. I haven't.

Q. I show you Plaintiff's Exhibit 1, Mr. Keith, and ask you if you will put an X at the approximate spot that you stood in the road on the night of July 31, 1949; where you observed the position of this man and woman.

The COURT: Well, is it marked with an X large enough now so that it can be seen?

Mr. COOPER: Yes, your Honor.

The COURT: Very well.

Q. Now, can you point out anything else in that exhibit on the road, any other article, that you have previously testified to?

A. The shoe.

Q. The shoe that appears in that photograph is the shoe concerning which you have just testified?

A. Yes, there is a red shoe laying there.

Q. Now, would you put a large letter S immediately adjacent to the spot where you recall having seen this man and woman in the weeds?

A. You mean in the spot where that was laying?

Q. Yes, sir.

A. I put an X before I thought.

Q. All right. You have marked XS then on Plaintiff's Exhibit 1, indicating the spot where you observed the man and woman in the grass the night of July 31, 1949?

A. Yes.

Q. At approximately 9:30 p. m., is that correct?

A. Yes.

Q. Now, what street is that that is shown in the exhibit, Mr. Keith?

A. This is A Street here; that is the alley there. Here is where the kid was going on the bicycle.

Q. And as you look toward that exhibit—

Mr. BUTCHER: Your Honor, at this point, where the witness says "This is A" and moves his arm and says "This is Ninth" and moves his arm, it doesn't mean anything to me back here, and I am sure it doesn't mean anything to the jury. Why can't he mark, if he knows, what the streets are?

The COURT: Well, I thought perhaps the photograph would speak for itself, at least in the case of those acquainted with Anchorage, but if not, why perhaps he should indicate on there what is the street and what is the alley.



Q. Would you indicate by the letter A along the edge of the street that is represented as A Street on that photograph, Mr. Keith?

The COURT: Well, now, there is only one street shown on there. If so, why it can be understood as A Street, if that is correct.

Q. Then, it is your testimony, Mr. Keith, that the  
143 street running parallel to the bottom and top of the picture is A Street?

A. That is A Street.

Q. And that the other street shown there is an alley, is that correct?

A. It is an alley.

Q. Now, as you face the exhibit, Plaintiff's Exhibit 1, Mr. Keith, where is Ninth on there, with respect to the right or left?

A. Ninth would be this way, down.

Q. Well, do you mean on the right or on your left?

Mr. BUTCHER: Again, your Honor, that kind of question is not securing information from the witness that is unambiguous. I don't know what he means when he waves his arm. I am sure the jury doesn't either.

The COURT: Well, does Ninth Avenue run at right angles to A Street?

A. Yes, sir.

The COURT: In other words, it would be along the right margin then of the picture, would it?

A. Yes, it would be on the right margin.

Q. And Eighth Street would be on the left margin of the picture, is that right?

A. Eighth Street.

Q. Would you take this pen and mark the little  
144 figure 9 over on the right margin there, then, and over here on this end would you mark the figure 8?

A. 8?

Q. Yes, representing Eighth.

A. Eighth would be further over this way.

Q. Yes, I understand. I am just trying to designate the directions of the two streets from this scene, Mr. Keith.

Mr. COOPER: May I hand the photograph to the jury, your Honor?

The COURT: You may. Each juror should pass it along as rapidly as possible.

WHEREUPON the exhibit was passed to the jury.

Mr. COOPER: Your witness.

## Cross Examination.

By Mr. BUTCHER:

Q. Mr. Keith, what was the time of night that you first saw this man and woman in the grass?

A. Approximately 9:30.

Q. About 9:30, and what was the condition as to darkness?

A. It was very light.

Q. It was very light. Was the sun still shining?

A. I don't recall whether it was shining or not.

Q. Had you been working that day?

A. I believe I had—now, I am not certain about  
145 that because I have two days off at that time.

Q. You had two days off about that time. You don't know, this being Sunday—were you working Sunday?

A. No, I wasn't. I wouldn't say that either. I forget the two days I had off, but I believe it was Wednesday and Thursday.

Q. And you said you were on the way home from town?

A. From town; yes, sir.

Q. And you had not yet crossed the park, had you?

A. Yes, I had crossed the park.

Q. When you refer to the park, do you refer to what is commonly known as the golf course?

A. No, the park by the ball park, that little park on the other side of the ball park.

Q. That is about Sixth or Seventh Street, is it?

A. Well, it is between Eighth and Ninth.

Q. Between Eighth and Ninth on A Street?

A. A Street borders one side of the park.

Q. Do you know where the A Street Grocery is, Mr. Keith?

A. Yes, I know.

Q. And then do you know some apartment houses or small bungalows are adjoining A Street, run down A Street?

A. You mean adjoining the store?

Q. Yes.

A. There is buildings adjoining the street there,  
146 runs the whole length of the half block.

Q. Yes, those are the buildings I refer to. Now, where is the park in relation to that?

A. The park is a block from there or more.

Q. Which way, north or south?

A. Towards town--north.

Q. Towards town. Now, do not those houses run between Eighth and Ninth Streets?

A. I don't get your question.

Q. The grocery store is on the corner of Ninth and A?

A. Ninth and A.

Q. And then these buildings, these bungalows, run toward town the length of that block?

A. The length of that half block.

Q. Towards town?

A. Towards town.

Q. So that part of the block would be consumed by those buildings?

A. That is right.

Q. Now, where does the park lie in relation to those buildings?

A. Well, it is a good block from there or more.

Q. Well, then, a good block from there towards town, would it be between Eighth and Ninth, would it, Mr. Keith?

Haven't you gone towards town and consumed al-  
147 most the entire block between Eighth and Ninth?

A. I may be mistaken. The park will be bordering on A Street, and I believe Eighth, wouldn't it?

Q. And then would it lie between Eighth and Seventh Streets on A Street?

A. I think so; yes.

Q. You think that is where it is rather than between Eighth and Ninth?

A. Yes.

Q. So you were incorrect then when you said it was between Eighth and Ninth?

A. I must have been.

Q. Now, you had been downtown. Had you been to a picture show?

A. No, sir.

Q. Where had you been, downtown?

A. Oh, I had been walking around the street and in a saloon or two.

Q. In the bars?

A. Yes.

Q. Had something to drink?

A. Had three drinks.

Q. Only three?

A. Yes.

Q. How long had you been downtown?

148 A. Oh, I couldn't say, offhand. I might have been down a couple of hours, maybe three hours.

Q. And when you looked over to the park, were you able to see the entire body of the man whom you alleged was the defendant?

A. He wasn't in the park.

Q. He was in the grass?

A. Yes, in the grass.

Q. Alongside this road?

A. Alongside the road.

Q. And did you see his entire body?

A. Yes, I could see him, but not her, just her feet.

Q. Well, haven't you testified that you saw a man and a woman lying there?

A. Yes; I could see her legs, her feet, and the lower part of her legs.

Q. You could see her legs?

A. Yes.

Q. And you were able to identify that it was a woman, you knew it was a woman?

A. I knew it was a woman.

Q. And it was sufficiently light to identify the man? When he raised up, how high did he raise?

A. Oh, he just raised up on his elbows a little, raised his head off the ground.

149 Q. Did you see his entire head?

A. Yes, very plain.

Q. And what about his shoulders and the rest of his body?

A. I could see his shoulders very plain.

Q. Did you see any other parts of his body?

A. I could see his body down—yes, quite a bit of it.

Q. Did you see his trousers?

A. Yes; yes, sir.

Q. How high, if you recall, was this grass?

A. Oh, it might have been two and a half or three feet. Some of the grass was higher than others.

Q. And this man didn't stand up?

A. No.

Q. He simply raised up on his elbows?

A. Yes.

Q. And regardless of the position that he assumed, you were still able to see the entire body?



A. Yes.

Q. Including his trousers?

A. Including his trousers; yes.

Q. And you were able to identify their color?

A. As near as I can recall, he had on a khaki shirt—

Q. Now I ask—

Mr. COOPER: Let the witness answer, please, your Honor.

150 The COURT: Yes, he should be allowed to finish his answer.

Mr. BUTCHER: Just a moment, your Honor. What was the question, your Honor? If his answer is not responsive to the question, then I submit he can't answer. Would the Reporter read the question?

Court REPORTER: Q. "And you were able to identify their color?"

A. He had on a khaki shirt—

Q. I am talking about the trousers.

Mr. BUTCHER: The question immediately prior to that, Miss Reporter.

Court REPORTER: Q. "Including his trousers?"

Q. Including the trousers, and were you able to identify the color?

A. They were a little darker than the shirt, if I recollect rightly.

Q. Now, were you able to remember the person you saw there so that when you saw him in the courtroom today you were able to recognize him as the same person?

A. I couldn't positively swear that he is the same person.

Q. Isn't it a fact, Mr. Keith, that a few moments before you were called into the jury room you came out into the hall and Mr. Moody pointed Mr. Carignan out to you and said "That is the man"?

151 A. No, he didn't point him out. I saw him before.

Q. Did he say anything about him in the hall?

A. Not that I recollect. He took me out there and I walked by and looked at him.

Q. Did he tell you that he was standing out in the hall?

A. Yes, he told me he was standing in the hall.

Q. And the position in the hall?

A. He didn't say the position.

Q. You knew when you came out, then, that the man standing in the hall was Mr. Carignan?

A. I saw him before; I should know him.

Q. You recalled him when you saw him in the hall, then?

A. Yes.

Q. Through no suggestion of the District Attorney?

A. No suggestion; no.

Q. Now you say, as you passed, you went on towards your home and you went home, in fact?

A. I didn't get that question.

Q. Did you say you went on home?

A. That night; yes.

Q. That night. And you remained in the home the rest of the night: is that correct?

A. I did.

Q. And what brought you back to this scene the following morning?

152 A. I had to go to work.

Q. And you were working at that time where you would have to pass this identical spot?

A. Well, I could either went that way or went the alley.

Q. When you came down the street on this particular morning, what caused you to go over and examine it?

A. I didn't go over there and examine it. I just looked from the street.

Q. And you could see the body of the woman?

A. I could.

Q. And you say the grass was about two feet tall there?

A. Yes; about that.

Q. You could see over that and still see the body of the woman?

A. Yes; there was a trail over to it where she had been dragged over there—already broken through there.

Q. Had you seen that trail the night before?

A. Yes; that is why I saw it—I could see them through that break.

Q. Do you know, Mr. Keith, that she had been dragged over there?

A. It looked very much like it. You could see the heel marks of her shoe in the road.

Q. The heel marks of her shoe in the road?

A. Yes.

153 Q. From where the shoe was lying in the road to the grass?

A. You could see, from the center of the road to the grass, you could see the heel marks.

Q. Well, now, a high heel or a flat heel—what kind of a heel made the mark? Do you know what kind of heels were on the shoe?

A. No, I couldn't state that.

Q. Do you know of your own knowledge that this was a heel mark?

A. Well, it was either a heel or a toe—it was a mark.

Q. Well, could it have been made by a child or anyone else with a stick?

A. Well, I suppose it could, but I am doubtful.

Q. You are just assuming, are you not, Mr. Keith, that it was a heel mark made by the heel of a woman's shoe?

A. That is what I took it to be.

Q. You don't know absolutely?

A. No.

Q. And you don't know that she was drug through the grass, do you, Mr. Keith?

A. It looked very much like it because there is no beaten trail through there.

Q. If someone walked through there and walked back, would the same kind of marks be made?

A. I doubt it very much.

154 Q. If a person crawled through the grass, would similar marks be made?

A. Oh, it probably would, but it looked to me very much like they were dragged through there.

Q. And you made this observation the following morning?

A. I did.

Q. But you don't know of your own knowledge someone was dragged through there?

A. No. I didn't see it.

did

Q. When / you next see the man whom you identified as the person you saw in the park in the grass?

A. In the police line-up.

Q. Did you have any difficulty recognizing him at that time?

A. Well, no. I picked him out as looking nearer like the man that I saw there than any man I have seen.

Q. Isn't it a fact, Mr. Keith, that when you first told your story to the police you said it was a man between 32 and 34 years of age?

A. That is what I took him to be.

Q. And a man who was unshaven and appeared to be dirty and unkempt?

A. Well, he looked like his clothes was dirty. I didn't say unshaved.

Q. And did you say, Mr. Keith, that he was about six foot four in height?

155 A. No, I didn't.

Q. Did you say anything about his height?

A. Well, I took him to be five foot ten or eleven, something like that.

Q. And you didn't see him standing up?

A. No, sir.

Q. You were just guessing at his height?

A. I was just guessing.

Q. You took him to be about five foot ten?

A. Five ten or eleven; something like that.

Q. Mr. Keith, did you know the woman whom you saw there?

A. No, sir; I never saw her before.

Q. It wasn't one of your neighbors?

A. No.

Q. Mr. Keith, when you saw the man over there in the grass with the woman, were you able to determine from your observation at that time, what sort of build he had, whether he was heavy or light?

A. Well, he looked like a good, husky man.

Q. He looked like a husky man?

A. Yes.

Q. That is the only impression you got. I think you previously testified that you didn't see anything of a hat?

A. No, I never saw no hat.

Mr. BUTCHER: That is all.

156 Mr. COOPER: That is all.

The COURT: You refer in your testimony to seeing the shoe in the road. Now, did you mean a road or street?

A. Well, it was in the street. It looked more like a road than a street.

The COURT: Well, it is a street, but without sidewalks?

A. Without sidewalks.

The COURT: That is all.

(Witness excused.)



HARRY SCHWARTZ, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

By Mr. COOPER:

Q. Will you state your name, please?

A. Harry Schwartz.

Q. What is your occupation, Mr. Schwartz?

A. I am a patrol sergeant on the Anchorage Police Force.

Q. And were you so employed on the first day of August, 1949?

A. I was.

Q. Calling your attention to the early morning of that date, was your attention directed to a body in the vicinity of Ninth and A?

A. Yes, sir; it was.

157. Q. By whom was that information given you?

A. By Mr. Henry Keith.

Q. And what did you do following receipt of that information?

A. I took Mr. Keith in the car with me and proceeded to the spot that he directed me to.

Q. What did you discover upon arriving there, Mr. Schwartz?

A. When I arrived at the scene I discovered the partially clad body of a woman in the tall grass.

Q. And were there others arrived at the time you were there?

A. During the time that I was there several other officers arrived. I called them by radio from my own patrol car.

Q. Mr. Schwartz, I would like to show you this article and ask you if it appears to be an article that you have ever seen before?

A. This is—

Q. Will you take it out of the package and look at it?

A. This is a lady's shoe that I found at the scene of the crime.

Q. And with respect to where the body was, where was the shoe found, officer?

A. There were two shoes found at the scene of the crime. One was lying in the street approximately thirty feet from the body and this shoe, the left shoe I believe, was three feet to the left of her body, lying in the tall grass.

158. Q. Now, did you see any other articles of clothing in that immediate vicinity?

A. The body was partially clad in a red coat and there was a scarf around her head. I couldn't give you much detail on the scarf, because it was bloody. She had on the remains of a torn dress and part of a girdle that had been torn.

Q. Did you find anything in the nature of a man's wearing apparel at the scene of the crime?

A. Four feet from her right foot and between the body and the road was a man's brown Knox hat.

Q. I will show you this hat, officer, and ask you if you recognize it?

A. Yes, sir; this is the hat. I recognize it from the bloodstains inside the hat.

Q. And what did you do with that hat after you recovered it, officer?

A. I left that hat laying right at the scene. I left all of these articles lying just as I found them until the photographer could be contacted.

Q. And did the photographer arrive while you were there?

A. The photographer arrived while I was there; yes, sir.

Q. You mean by that, the police photographer?

A. The police photographer, Sergeant Moore.

Q. Did he take pictures while you were there?

A. Yes, sir, he did.

Q. Now, did the Doctor also arrive while you were there?

159 A. I sent the car for Doctor O'Malley. He was the first to arrive.

Q. I want to show you this photograph, officer, and ask you if it appears to accurately represent the scene and the body of the person that you found when you arrived there with Mr. Keith on the morning of August 1, 1949?

A. Yes, sir, that is the identical position of the body as I found it.

Mr. COOPER: We offer the photograph in evidence.

Mr. BUTCHER: I will object to it, your Honor, on the ground that a proper foundation hasn't been laid for its introduction.

The COURT: Objection overruled. It may be admitted and marked Plaintiff's Exhibit No. 2.

Mr. COOPER: At this time we would like to offer the hat in evidence, your Honor.

Mr. BUTCHER: We object to the introduction of this, your Honor, on the ground that no connection has been

shown that this hat had anything to do with the defendant and that picking up of a hat or any other article at the scene of the crime would not indicate that it had anything to do with the crime, or was not present at the time that the crime was committed. A blade of grass might be introduced in evidence.

The COURT: Subject to being connected up, the exhibit is admitted in evidence and it may be marked as  
160 Plaintiff's Exhibit No. 3.

Mr. COOPER: Now may I show the photograph to the jury, your Honor?

The COURT: Do you wish to show the hat, too?

Mr. COOPER: Yes, your Honor.

The COURT: Then you might show both of them at the same time.

Q. Mr. Schwartz, did you make any other observations as to the condition of the ground in that immediate vicinity?

A. The ground around the body had been mashed down flat. I might add that the grass in the area was knee high, or perhaps a little better in some spots, to me. There was a shoe lying in the road and there were marks where the heel of the other shoe had dragged through the ground toward the lot and a path was mashed down in the grass, where apparently something had been dragged through the grass towards the spot where the body lay. Along this path lay the hat and between the hat and the road lay a pair of glasses, gold rimmed glasses, bifocals. These also I left until they could be measured and definitely located in the picture.

Mr. BUTCHER: Your Honor, it is my recollection that your Honor didn't admit the hat in evidence. It was admitted subject to being connected up and merely identified.

The COURT: No, it is admitted in evidence, sub-  
161 ject to being ruled out in case there is a failure to connect it up with the defendant, so it is in evidence now.

WHEREUPON Plaintiff's Exhibits 2 and 3 were shown to the jury.

Mr. COOPER: Your witness.

#### Cross Examination.

By Mr. BUTCHER:

Q. Mr. Schwartz, you have or had no knowledge at that time who these shoes belonged to?

A. No, sir, I had no knowledge who they belonged to at that time.

Q. You had no positive knowledge they had any connection with the body lying in the grass?

A. The only connection that I had with those shoes and the body lying in the grass was the fact that one shoe was lying in the street near the grooves in the street, where something had been dragged, and the other shoe lay approximately three feet from the body in the tall grass.

Q. And the same is true of the hat; so far as you know it is a hat—is that not correct? You don't know who it belonged to or who it did belong to?

A. As far as I know it was a hat. It was lying near the body and had very marked bloodstains inside the lining.

Q. That is all you know about it?

162 A. That is all I know.

Q. About the hat?

A. About the hat.

Q. It could have belonged to anyone who had discarded it there?

A. It couldn't have belonged to anyone who was discarding it without making a special effort to discard it in that particular spot in the lot. It was within four feet of the body and was in the mashed down area around the body.

Q. Was it freshly mashed or old or dusty?

A. It appeared to be freshly mashed.

Q. In the same condition it is now?

A. No. It has been some time since I found that hat, and when I found that hat it was laying in dewey grass and the grass was all damp. The hat was not, with the exception of the bloodstains, which were very fresh.

Q. The hat was not damp?

A. No.

Q. Is the hat any different now than it was then?

A. Yes. It is in a different shape than it was at the time I found it.

Q. What shape was it in when you found it?

A. I would like to demonstrate with the hat.

WHEREUPON the hat was handed to the witness.

A. Approximately that shape, sir.

163 Q. Then this crease that can be observed here was not in the hat at that time?

A. The crease was in the hat; yes. It had been pushed out the way I just showed you. The crease was clearly visible in the hat.



Q. You saw the crease at that time?

A. Yes.

Q. What was the condition of the lining when you saw the hat?

A. The lining was bloodstained; the lining was in the hat.

Q. Well, as to being torn out or—

A. It wasn't torn out. The lining was intact at the time.

Q. Do you know in what way the lining was torn from the hat?

A. No, sir, I don't.

Q. But you do know that it was not torn out at the time you found the hat?

A. To the best of my knowledge, it was not.

Q. What did you do with the hat when you found it?

A. I left it lying there so that it could be included in the photographs if possible. I didn't pick up any of the articles that I found there.

Q. Were you present when the photographs were taken?

A. Yes, that is correct.

Q. What happened to the hat afterwards?

A. Afterwards it was picked up by someone, by one of the investigators at the scene. I am not sure whether  
164 it was a representative of the Marshal's office or whether it was a representative of the City Police Department. It was gathered up with the other articles and placed in a cardboard box.

Q. And you saw that happen?

A. Yes, I did.

Q. Did you see anyone tamper with the lining at that time?

A. No, I didn't.

Q. But you are positive in your statement that the lining was not torn from the hat at the time you found it?

A. Not positive; I believe that it was intact—I am not positive.

Q. You believe it was intact, but it was not torn out as it is at the present time?

A. That is correct.

Q. So that the hat has obviously been tampered with since you found it at the scene?

Mr. COOPER: We object to the statement in that form, your Honor.

The COURT: Yes. Objection sustained. That is assuming that the hat has been tampered with and there is no

evidence of that. In other words, the form of the question assumes something not in evidence.

Mr. BUTCHER: Well, your Honor, the witness has put the matter in evidence. He testifies the lining was not  
165 torn from the hat, and now it is torn from the hat.

The COURT: That doesn't imply that it has been tampered with. It could have happened in any other way. "Tampered" has connotations of wrongdoing.

Q. Now, the glasses that you say you found at the scene of the incident—do you know,—had you seen those glasses before?

A. I hadn't seen them before the crime; no.

Q. Do you know anyone to whom they belonged?

A. No, I don't know to whom they belonged. I assumed, from the photograph that I saw of the victim, that they were her glasses.

Q. At that time you had not seen the photograph?

A. At that time I had not seen the photograph.

Q. They were just a pair of glasses that you found near the scene?

A. That is correct.

Q. Did you find them in the road or in the grass?

A. I found them in the grass, in the mashed-down path leading from the road to the spot.

Q. Approximately where?

A. Approximately eight feet from the body, four feet from the hat; between the hat and the road.

Mr. BUTCHER: That is all.

Mr. COOPER: That is all.

166 A JUROR: I would like to ask a question, sir.

The COURT: Very well.

A JUROR: Standing on A Street, could you see the body—if you were standing in the middle of the street?

A. Standing in the middle of the street, it would be difficult to see, at the time that I found the body; however, during the investigation the grass became mashed down so that it could be seen from the middle of the street. As I drove up to the scene I pulled my car to the left-hand side of the street, which put me right beside the lot and by rising up out of the car with one foot on the runningboard, I was able to see the body lying there.

A JUROR: By standing on the ground, you couldn't see it?

A. Standing on the ground, I was aware that there was something there, but I couldn't see what it was until I took a closer examination.

A JUROR: Thank you.

## Re-direct Examination.

By Mr. COOPER:

Q. Mr. Schwartz, by going to the edge of the road and looking—

Mr. BUTCHER: I object to that as a leading question your Honor.

Mr. COOPER: Well, he doesn't even know what I  
167 am asking yet, your Honor.

Mr. BUTCHER: "By going to the edge of the road could you" and that is as far as he went—of course, it is leading, your Honor.

The COURT: Well, I think he should be allowed to finish the question. The Court is not sure it is leading until there is more of the question asked than has been asked.

Q. By standing at the edge of the road and looking down this pathway that you have described, was the body or any part of the body visible from that viewpoint?

Mr. BUTCHER: Now, I object to that, your Honor.

Q. If you know—

Mr. BUTCHER: I object on the ground that it is leading, your Honor. The witness has testified that by standing with one foot on the runningboard of the car, raising up, he could see the body, but by standing on the road he could not. Now the District Attorney invites him to see the body by standing at the edge of the road on the ground, and it is leading.

The COURT: He has the right to ask him if it could be seen from other places. Now, the only objection I see to his question—that he uses the word "pathway" instead of what obviously was a swath through the grass, testified to by the previous witness. Objection overruled.

A. I pulled the car up. I wasn't aware of that  
168 swath, and I was looking directly over the grass; however, if one would stand at the edge of that grass swath and look in towards the body, you could see it from the road.

Q. You say you could or could not?

A. You could.

Mr. COOPER: That is all.

Mr. BUTCHER: That is all.

(Witness excused.)

Mr. COOPER: If the Court please, at this point in the proceeding, I should like to file a stipulation entered into by myself and Mr. Butcher concerning an affidavit made out by Dr. O'Malley, who is not present in town at the present

time. I would like to file this stipulation and then I would like to introduce this affidavit, your Honor.

The COURT: Well, if you have entered into a stipulation, I should think that you could offer the affidavit in evidence.

Mr. BUTCHER: Your Honor, with one exception—the stipulation was entered into, based on the fact that Dr. O'Malley would not be present in the City of Anchorage at the time of trial. I called Dr. O'Malley's office Saturday and they told me they expected him to arrive, both he and his wife, in town today, or perhaps tomorrow at the latest, by Northwest Airlines. Now, I wonder if the District Attorney has made an effort today to ascertain the presence of Dr. O'Malley in town, and I think if he were here, it would be far better to have him as a witness.

Mr. COOPER: I would certainly prefer having him here, too, your Honor. The last information I had was that Dr. O'Malley would not arrive until approximately the 15th; however, I have no desire to have this go before the jury on an affidavit if it is possible to obtain Dr. O'Malley at any time before the trial ends.

The COURT: Well, do you have some other witness you can call?

Mr. COOPER: I will see, your Honor. If the Court please, the next two witnesses I anticipated calling in this case have not arrived. Probably one of them will be here in approximately five minutes, or we can continue that phase of it until tomorrow, at your Honor's convenience. It doesn't make any difference to me.

The COURT: Well, we will take a recess for five minutes.

WHEREUPON Court recessed for five minutes, reconvening as per recess with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:

170 CHARLES H. STOWELL, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

#### Direct Examination.

By Mr. COOPER:

Q. Will you state your name, please?

A. Charles H. Stowell.

Q. You are Chief of Police of the City of Anchorage?

A. Yes, sir.



Q. And were you so engaged on the first day of August, 1949?

A. Yes, sir.

Q. Now, did you have occasion to go on that morning to the vicinity of Ninth and A Street?

A. Yes, sir.

Q. For what purpose?

A. To investigate a murder.

Q. And now, at the time you went there, Chief, did you observe or recover any articles of any kind?

A. Yes, sir.

Q. What?

A. A tablet and a shoe.

Q. When you say "a tablet", what do you mean, Chief?

A. A writing pad.

Q. I show you this and ask you if that object looks familiar?

A. Yes, sir.

Q. And where did you find that?

171 A. That was approximately 75 feet away from the body on A Street, toward the west side.

Q. Was it lying in A Street?

A. Yes, sir.

Q. Now, was it covered, wrapped, as you observed it there?

A. Yes, sir.

Q. Now, what else did you say you found?

A. A shoe.

Q. Do you recall whether it was a left shoe or a right shoe?

A. It was a right shoe.

Q. A man's shoe or a woman's?

A. A woman's shoe.

Q. I will show you this object and ask you if you can identify that?

A. That is the shoe I picked up.

Mr. COOPER: At this time we would like to introduce the tablet in evidence.

Mr. BUTCHER: Well, your Honor, this has been identified as a tablet, but to me it is a package, and what it contains I don't know. May I ask the witness if he knows what it contains, and how he knows?

The COURT: You may.

Mr. BUTCHER: Mr. Stowell, you have identified this as a tablet. Did you take the package apart and open it?

A. No, I opened the end of it up.

172 Mr. BUTCHER: This torn part is where you tore the package open?

A. Yes, sir.

Mr. BUTCHER: And as the result of that tearing open you discovered it was a tablet?

A. Yes, sir.

Mr. BUTCHER: Well, I don't know what relation it has, but no objection.

The COURT: If there is no objection it may be admitted and marked Plaintiff's Exhibit No. 4.

Mr. COOPER: Your witness.

Mr. BUTCHER: Now, your Honor, Mr. Stowell was questioned about a shoe, and if the District Attorney had no purpose in that questioning, then I ask that the testimony about the shoe be stricken. He has not introduced the shoe in evidence; he is simply asking questions about it. He didn't show it to counsel for the defendant, as was his duty to do if he did ask questions about it. As the result, the time of the Court has been wasted and no value connected with that testimony, and I ask that it be stricken.

Mr. COOPER: Very well, your Honor, we offer the shoe in evidence. I assume there is no objection under the circumstances.

Mr. BUTCHER: Yes; I must see the shoe first. May I have the other shoe? There was another shoe introduced  
173 in evidence.

Clerk of Court: No shoe.

Mr. MOODY: It wasn't introduced.

Mr. BUTCHER: Mr. Stowell, you say you found this shoe?

A. Yes, sir.

Mr. BUTCHER: Whereabouts did you find it?

A. About thirty feet away from the body on A Street, possibly three feet from the side of the road.

Mr. BUTCHER: In the road or in the grass?

A. In the road.

Mr. BUTCHER: Well, are you offering it as an exhibit at this time?

Mr. COOPER: Yes.

Mr. BUTCHER: Well, we object to it on the ground that there has been no connection whatever made as to the shoe, with the body.

The COURT: Well, I assume that that often happens, if you can't connect an article offered as an exhibit with somebody by the testimony of one witness, it obviously would require testimony of others, so the objection is overruled.

WHEREUPON the exhibit was admitted and marked Plaintiff's Exhibit No. 5.

## 174 Cross Examination.

By Mr. BUTCHER:

Q. Mr. Stowell, were you the first man on the scene of the crime?

A. No, sir.

Q. Who was there prior to you?

A. To the best of my recollection, Captain Barkdoll, Sergeant Schwartz, several other patrolmen, Deputy Marshal Hoff.

Q. And, when you arrived there, this shoe that you have identified, was in the road about three feet from the edge, where the swath went into the grass?

A. Yes, sir.

Q. And it was still there when you got there?

A. Yes, sir.

Q. And you saw it, and did you remove it from that spot?

A. Yes, sir.

Q. Did you put it into a box?

A. Yes, sir.

Q. You had brought that cardboard box—is that the box you are referring to?

A. I haven't referred to any box, counsellor.

Q. When you said you put it in a box, is it a cardboard box that you refer to?

A. Yes, sir.

Q. You had brought that cardboard box with you?

175 A. With me where?

Q. Well, where you came from?

A. The cardboard box was turned over to the Marshal.

Q. Where did you get that cardboard box?

Mr. COOPER: Objected to as immaterial, your Honor.

The COURT: Objection sustained.

Q. What did you put in the cardboard box besides the shoe?

Mr. COOPER: Objected to as improper cross examination.

The COURT: Well, I think it is within the scope of the direct examination. Objection overruled.

Q. You may answer.

A. What was the question?

Q. What did you put into the box besides the shoe?

A. The tablet and the shoe.

Q. Anything else?

A. No, sir.

Q. Was there anything in the box when you put the tablet and shoe in there?

A. Yes, sir.

Q. What else was in the box?

A. Some of Mrs. Showalter's clothing.

Q. Now, wait a minute. Did you know at that time that it was Mrs. Showalter's?

The COURT: Well, do you mean for the purpose of  
176 determining whether it was her clothing?

Mr. BUTCHER: No, your Honor. There has been no identification whatever that this body that was lying in the grass was Mrs. Showalter, and he stated that some of Mrs. Showalter's clothing—

The COURT: Well, it all depends on whether he is testifying from present knowledge or from his knowledge at that time. Now, if he is testifying from present knowledge, of course, it takes into consideration what he learned later. I don't know what time he is testifying to.

Mr. BUTCHER: The witness is testifying as to what occurred that morning, your Honor, and the body has not been identified.

The COURT: But the ownership of clothing is not something that occurs. It is a continuing thing, and when a question is asked that way, I assume the witness is answering on the basis that he not merely saw it that morning, but has learned since. You may make your question a little more specific or definite.

Mr. BUTCHER: My question referred to the time—I was examining him on what was put in the box. I asked what else was in the box. He answered "other things belonging to Mrs. Showalter" and at that time there could have been no knowledge in his mind as to who the articles belonged to.

The COURT: My point is, your question does not  
177 exclude testimony of what he has learned since as to the ownership of these articles. There is nothing improper about an answer of that kind, because he can take into consideration what he learned since.

Mr. BUTCHER: I will take an exception.

The COURT: He could answer this way: "I put into the box clothing I later learned belonged to Mrs. Showalter." It is splitting hairs.

Mr. BUTCHER: I would consider it highly irresponsible.

The COURT: Unless your question limits him to what he knew then, there is nothing improper about his answer.

Mr. BUTCHER: I object to his answer and ask that it be stricken. Your Honor has ruled, and I would like to take an exception to that ruling.



Q. Mr. Stowell, were you present when the photographers arrived?

A. I don't recall.

Q. Do you know who the photographers were?

A. No, sir.

Q. You don't know who took the pictures?

A. No, sir.

Q. You don't know whether you were present then when they were taken, do you?

A. No, sir.

Q. And yet you picked these articles up and put  
178 them in the box and no photograph had been taken at that time?

Mr. COOPER: Now, we object to the question being put in that manner. We submit it is argumentative.

The COURT: It assumes matter not in evidence, as I see it; at least there is nothing in evidence as to the sequence of these things, the sequence of these several acts which you embody in your question.

Mr. BUTCHER: Your Honor, the witness testified he, along with other officers, arrived at the scene of the crime as soon as he got word, shortly after Mr. Schwartz's radio call. Mr. Schwartz testified, and it was apparent, that he sent for the photographers. When Mr. Stowell came he picked up the shoe and other articles and the tablet and put them in the box, so that there could not have been in the street, the shoe, at least—

Mr. COOPER: Now, if the Court please, we submit that this is argumentative and that it is improper.

The COURT: Well, unless you first show that this witness knew what had occurred before he arrived, then you may embody those facts in your question, but at the present time you haven't shown that. There is no foundation for asking the question in that form, which attempts to relate the sequence of the several acts there, that were committed by the officers.

Mr. BUTCHER: I will lay a foundation then, your Honor.

I thought I had laid a sufficient foundation.

179 Q. Mr. Stowell, how soon after Mr. Schwartz reported the presence of a body of a woman, did you arrive there?

A. I arrived there approximately 7:00 o'clock in the morning.

Q. Where did you receive word that there was a body?

A. At my home.

\*Q. And do you know what time the body was found by Mr. Schwartz?

A. I don't recall the exact time.

Q. Do you know of your own knowledge whether photographers had been there when you came?

A. No, sir.

Q. Do you know of your own knowledge that photographers came after you were there?

A. No, sir.

Q. Then, from your knowledge, you didn't know anything about the pictures, the photographs?

A. Only that I saw them after they were taken.

Q. After they were developed, you mean?

A. Yes, sir.

Mr. BUTCHER: That is all.

Mr. COOPER: That is all.

(Witness excused.)

The COURT: Court is now about to adjourn. Ladies and gentlemen of the jury, in addition to the admonition that you have heretofore been given and heard given, you are also admonished not to read the newspaper accounts of this case, and to refrain from listening to

out M. K. M.

any broadcasts of it, so that you may keep everything / of mind except what occurs in this courtroom.

WHEREUPON Court adjourned until 10:00 o'clock a. m. December 13, 1949, reconvening as per adjournment with all parties present as heretofore and the jury all present in the box: whereupon the trial proceeded as follows:

The COURT: You may proceed.

JOE KLOUDA, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

By Mr. COOPER:

Q. Would you state your name, please?

A. Joe Klouda.

Q. Where are you employed?

A. Bert's Drugstore.

Q. Were you employed there on the 31st day of July, 1949?

A. I was.

Q. I will show you Plaintiff's Exhibit No. 4, Mr. Klouda. I will ask you to unwrap this package and examine its contents and state whether or not you recognize it.

A. Yes, I do.

Q. And what is that?

181 A. Well, it is an airmail tablet.

Q. And how do you recognize it, Mr. Klonda?

A. Well, it is my mark on the cost of it.

Q. Do you recall the circumstances under which that tablet left your possession?

A. Well, one like it or this type, I sold one on Sunday evening after the show to rather an elderly lady.

Q. Would you attempt to place the time, approximately?

A. Well, it would be right after the show, during the show rush, a few minutes after nine, or just about nine.

Q. You can't definitely identify the lady, other than the fact that she was an elderly lady?

A. No.

Mr. COOPER: Your witness.

#### Cross Examination.

By Mr. WEIR:

Q. Mr. Klonda, you say you work at Bert's Drugstore?

A. Yes, sir.

Q. How long have you been working there?

A. Oh, since about 1940.

Q. From your experience, could you roughly approximate how many people come in there on a Sunday evening at this time of the year, around showtime?

A. It varies. Sometimes only maybe a few, some-  
182 times maybe about twenty.

Q. To your knowledge does Bert's carry this type of a tablet in stock?

A. We don't now.

Q. But you did at the time?

A. Yes.

Q. Could you—do you know how many of those tablets you sold on the night in question?

A. I sold? That was the only one.

Q. This lady that you testified to, that you sold this tablet to or a tablet like this to, had you ever seen her before?

A. No.

Q. It was the first time you ever saw her?

A. Yes.

Q. Have you discussed this case with anyone?

A. No—well, I don't quite get what you mean.

Q. Have you talked it over with anyone, discussed it with anyone?

A. Maybe everyday conversation; yes.

Q. Could you explain—as you say, about nine, I believe you said, and twenty people come in of a Sunday evening at that time of year, could you explain how you recall that you did sell a tablet on that date to a lady? How do you fix the incident?

A. Well, I don't work—I mean, I didn't work that Sunday, and I came in after the show with my wife and helped out with the rush after the show. I remember this lady stepped back from the counter and I asked if I could help her. She didn't come right up to the counter.

Mr. WEIR: No further questions.

#### Re-direct Examination.

By Mr. COOPER:

Q. Mr. Klonda, were you contacted shortly after that date by the Police Department, by members of the Police Department?

A. Yes; next morning they asked us if this came from our place.

Mr. COOPER: That is all.

Mr. WEIR: No further questions.

(Witness excused.)

WILLIAM WILSON, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

#### Direct Examination.

By Mr. COOPER:

Q. Will you state your name, please, sir?

A. William Wilson.

Q. By whom are you employed?

A. By the City of Anchorage, Police Department.

184 Q. Were you so employed on the first day of August, 1949?

A. I was.

Q. In that connection, did you have occasion to visit the vicinity of Ninth and A in connection with a dead body?

A. I did.

Q. Did you find any articles of any kind around the scene of the body?

A. I did.

Q. What?

A. Well, I found a pair of glasses, observed a hat, a red slipper, and a pad of writing paper across the road from the body.



Q. When you say "across the road" what street do you mean?

A. Across A.

Q. I will show you these and ask if they appear to be anything that you have seen before?

A. They appear to be the glasses that I found.

Q. And where, with reference to the location of the body, were the glasses found, Mr. Wilson?

A. Well, the glasses were found towards A Street from the body, almost to A Street.

Q. And now, did you notice any evidence around the scene of the crime, that is, between the body and A Street, indicating whether or not the grass had been trampled down?

A. I did.

185 Q. Now, with reference to that portion of the area, where did you find the glasses?

A. Well, where it appeared that the grass, there had been a line of grass trampled on from the road to the body. It was on the north side, where this grass was trampled on.

Q. Well, with reference to where the grass had been trampled down, how close to that?

A. Right alongside of it, very close to it.

Q. And what did you do then with these glasses after you found them, officer?

A. Well, they were left there temporarily, until photographs were taken. I picked up those glasses. I went to Car Five Three and got a cloth that was in the car, brought it back, picked up the glasses and put it in the cloth.

Q. And do you know what later became of the glasses?

A. They were brought to the Police Station.

Q. And then later, what became of them?

A. They were given to the Marshal.

Mr. COOPER: We would like to introduce the glasses in evidence.

Mr. BUTCHER: We object to them, the introduction of them, on the grounds that they haven't been shown to be the property of the deceased.

The COURT: The objection is overruled, although I don't see at this stage, at least, much evidentiary value. 186 unless it becomes material to show the identity of these particular glasses or something of that sort. The exhibit may be admitted and marked Plaintiff's Exhibit 6.

Mr. COOPER: No further questions.

## Cross Examination.

By Mr. WEIR:

Q. Mr. Wilson, I believe you testified that, well, what time did you arrive at the scene?

A. I do not recall right now, the exact time.

Q. Well, do you recall whether it was before or after the photographers arrived?

A. It was before. I was with Sergeant Schwartz. We were the first two officers at the scene.

Q. Well, could you give an approximate time between—the period between the time that you arrived at the scene and the time that the photographers arrived?

A. How much time had elapsed?

Q. Yes.

A. I would say approximately twenty or twenty-five minutes.

Q. In that time, I believe you testified, you discovered the tablet and the glasses?

A. That is correct.

Q. And various other items?

A. That is correct.

187. Q. And you say the tablet—I believe you said it was across—where did you say the tablet was?

A. It was at a diagonal from the alley across A Street.

Q. It was across A Street?

A. Correct.

Q. The opposite side from the scene?

A. Correct.

Q. Was it in the road or—

A. Just on the side of the road.

Q. On the side; down in the gutter?

A. There was no gutter.

Q. Could you fix a time interval that the photographers were there at the scene?

A. How long they were there?

Q. Yes.

A. I couldn't say definitely.

Q. Well, I mean approximately—five, ten, twenty minutes?

A. I don't know how close an estimate I could give. I would say, about, approximately, an hour.

Q. I see. Were you there all the while they were there?

A. I don't recall if I left ahead of them.

Q. While you were there, did you see Chief Stowell?

A. I did.

Q. Did he arrive with you or after you?

A. Afterwards.

188 Q. He arrived after. Would you say how soon after?

Mr. COOPER: We object to any further questions along this line as improper cross.

The COURT: Objection sustained.

Mr. BUTCHER: Your Honor, may I ask why it is improper cross?

The COURT: Well, the witness has not testified as to the sequence in which various people arrived there on direct.

Mr. BUTCHER: I can't hear you, Honor.

The COURT: I say, the witness did not testify on direct the sequence in which various people arrived at the scene of the crime, and, therefore, it is improper cross examination.

Mr. BUTCHER: Mr. Weir is endeavoring now—the Chief has already testified that he was there, and Mr. Weir has questioned the witness now to find out when the Chief was there.

The COURT: That is just why it is improper, because one witness cannot be questioned merely for the purpose of developing either inconsistencies or contradiction between his testimony and the testimony of somebody else. Even though it was not cross examination, it would still—or even if it were cross examination, in one sense, it would still be improper.

Mr. BUTCHER: Well, I have no desire to disagree with your Honor, but it seems to me cross examination of  
189 the witness who testified that he was at the scene of the crime and he is, therefore, then available for questioning on everything that happened at the scene of the crime, and if the question is whether the Chief was there and what time he was there, and he knows it, he certainly is entitled to answer it or required to answer it, and the objection of the District Attorney that it is not proper cross examination certainly doesn't seem to be in order.

Mr. COOPER: If the Court please, we take a different view of this matter. If there is something other than what has been brought out in direct examination here and counsel desires to develop it, it can be done by calling Mr. Wilson as his own witness.

The COURT: Yes. You can call him as your own witness if you feel that it is important to your case, but this is outside of the scope of the direct examination. After all,

this witness was called for a limited purpose only, which is obvious from his examination in chief.

Mr. BUTCHER: If the purpose for which he was called, your Honor, was to identify what occurred and what he saw at the scene of the crime, and I am certain that that is why he was called--

Mr. COOPER: If the Court please--

Mr. BUTCHER: Just a moment until I finish, Mr. Cooper. If he was called for that purpose, then anything he saw, your Honor, or anything he did at the scene of the crime--he was sworn to tell the whole truth and nothing but the truth--and the whole truth would be what happened there, and any limitations placed upon an examination as to two items he might have picked up and maybe he picked up more than that, he certainly should be required to answer, and I think we have a right to an answer, to demand his answer.

The COURT: Well, if it is not merely for the purpose, as I intimated a while ago, of developing inconsistencies between the testimony of this witness and somebody else, you may go into it, but if your sole purpose is, as so often develops, to merely develop inconsistencies or contradictions in the testimony of two or more witnesses, then for that purpose alone the examination will not be permitted. If you have some other purpose you may go into it.

Mr. BUTCHER: Well, I think that Mr. Weir's—I don't know what Mr. Weir had in mind, your Honor, but I believe Mr. Weir intended to make a thorough cross examination of everything this man knows, of his observations at the scene of the crime, and I think that was Mr. Weir's intention. I don't think there was any effort to establish a cross between this man's testimony and the Chief's, but simply to learn all we can about what this man saw at the scene of the crime.

The COURT: Well, you may proceed with the examination.

Q. Mr. Wilson, starting again, could you approximate what time you arrived at the scene?

Mr. COOPER: Objected to as having been asked and answered.

The COURT: Yes, the objection is sustained.

Mr. BUTCHER: Your Honor, he asked the witness when he arrived, and he said "I can't say definitely," and then Mr. Weir went on to another question. Now, I have just suggested to Mr. Weir that if the man can't answer definite-



ly, that is, by his watch, if he can answer so that we will know how to correlate these events in sequence, if he knows the time he arrived there then we will know when the photographers arrived, and if the photographers stayed for an hour, we will know when they left, and this witness can't be of any value in the case unless we are able to establish the time.

The COURT: Well, didn't he testify that he and Officer Schwartz were the first officers on the scene?

Mr. BUTCHER: Yes.

The COURT: Well, that would fix the time.

Mr. BUTCHER: He testified that he didn't know definitely the time. Now, does he know generally the time? That is the question we want to know now.

Mr. COOPER: The question has already been asked and answered, your Honor. Another thing in this connection, we feel, your Honor, that Mr. Weir is competent to cross examine the witness and, therefore, should argue  
192 his own—argue the objections to the Court, rather than Mr. Butcher.

The COURT: Well, you may proceed, but avoid repetition, of course. This Court can't afford to be extravagant with time. It is too far behind in its work, so avoid repetition.

Q. Mr. Wilson, I believe that you testified that you were there when Chief Stowell arrived?

A. I did.

Q. Could you fix—could you say whether Chief Stowell arrived before or after the photographers arrived?

The COURT: Well, now you claim that it is material to show the order in which people arrived there?

Mr. WEIR: Your Honor, I am merely trying to find out events as they happened.

The COURT: Well, but that isn't permitted, unless it has materiality and relevancy here, and just the thing the Court has been trying to avoid. Unless you contend the Order in which the several persons arrived there is important or vital or material, of course the Court has to put a stop to it.

Mr. WEIR: Well, your Honor, as far as the veracity of those pictures go, that is vital and important.

The COURT: Well, if you have any reason to doubt the accuracy of the pictures, you can ask him with reference to the pictures, but not the order in which people arrived  
193 there, and furthermore, you may call the photographer as your own witness.

Q. Mr. Wilson, these articles that you have testified to, did you pick them up—I believe the glasses and the tablet?

A. I picked up the glasses, but not the tablet.

Q. Did you see anyone else pick up any of the articles?

A. Not to my knowledge.

Mr. WEIR: No further questions.

Mr. COOPER: That is all.

(Witness excused.)

Mr. BUTCHER: Your Honor, at this time I would like to make an objection to the procedure. Three witnesses have been called, all of which have testified to almost identically the same thing. We had Officer Schwartz here, who testified that he saw this shoe and he saw the glasses and he saw the swath through the grass, and the Chief of Police was called, and I don't know yet why he was called.

Mr. COOPER: Now, if the Court please, it is immaterial whether Mr. Butcher knows why a witness is called or not. It is a matter for the jury to determine, whether the evidence adduced here is important to this case, and I think it is a matter for the prosecution to determine in this case what witnesses they will call and what they will not call.

The COURT: Well, as I said a moment ago this 194 - Court is too far behind with its work to afford to be extravagant or even overly generous with time, but after all, it is up to the Court when there should be a limit on witnesses who testified merely cumulatively. Now, there isn't any contention made here, as I understand, that this is merely cumulative evidence. It is obvious that it was put in for corroborative purposes: in other words, the theory at least of the plaintiff is that this evidence, even though it may seem to you to amount to no more than you think it is, is corroborative evidence, and the Court has no power to limit the introduction of that kind of evidence, regardless of how it may strike somebody else, and hence there is no action of the kind contemplated that can be taken by the Court.

Mr. BUTCHER: Well, I simply want to get my objection on the record and ask, your Honor, that the testimony of the last witness, Mr. Wilson, be stricken on the grounds that it is strictly cumulative, that it has been testified to before and your Honor of course has ruled, and I would like to take an exception to that ruling.

The COURT: Well, there is a further reason why the Court cannot entertain a motion of this kind at this time. It is well known, of course, that no case can be proved by one, two, or three or four witnesses, in a case that depends

at least partly on circumstantial evidence. It takes a lot of witnesses, and one bit of testimony as it comes in  
 195 might have no bearing whatever on the ultimate issue for the jury, and yet when it is considered in connection with evidence that is introduced three or four days later, it might have an important bearing. That is why the Court cannot entertain a motion of this kind at this time. It is premature.

Mr. BUTCHER: Then may we ask, your Honor, that any generosity as to time granted to the prosecution be equally granted to our side, so that we may explore these things if we feel it necessary in detail?

The COURT: The Court is not going to be partial, so far as any indulgence in the matter of time is concerned. It is going to treat both parties equally, but the Court is calling attention to that fact, that the Court cannot, because it is so far behind in its work, afford to be extravagant or overly generous, merely as a caution to counsel. That is all.

Mr. COOPER: May I state, for the purpose of the record, that there certainly isn't going to be any effort on the Government's part to prevent Mr. Butcher from calling all the witnesses that he wants to call on the defense.

The COURT: Well, let's proceed now.

Mr. BUTCHER: Your Honor, at this time, I think it is a good time—so far the case has travelled more speedily than I had thought it would, and the defendant here is going to be compelled to call certain witnesses. He has no money to pay for it. I would like the Court to issue an or-  
 196 der, if necessary, to have the Government subpoena these witnesses for him and have them here so that there will be no delay when the prosecution rests.

Mr. COOPER: I will be glad to do that upon the proper showing, as outlined in the law, your Honor.

The COURT: Yes, there should be the usual showing made, and are these witnesses living here?

Mr. BUTCHER: They are, all soldiers, your Honor, on the Post.

The COURT: Well, you may make your showing and if the showing complies with the law, the Court will order the attendance at the expense of the United States.

Mr. BUTCHER: May I make a showing right now, your Honor?

The COURT: It would be improper to make it in the presence of the jury. Why don't you submit it, for instance, at 1:45 or so?

Mr. BUTCHER: All right, your Honor.

MARY FAE REDDICK, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

By Mr. COOPER:

Q. Would you state your name, please?

A. Mary Fae Reddick.

197 Q. What is your business or occupation?

A. My husband and I own a cleaning plant.

Q. Which cleaning plant is that?

A. Peacock Cleaners.

Q. Did you know Mrs. Showalter?

A. Yes, Mrs. Showalter worked for us ~~three years~~.

Q. And you knew her for that period of time?

A. Did you say "before"?

Q. No; for that period of time—you were acquainted with her?

A. Yes.

Q. And how often did you see her during that period of time, Mrs. Reddick?

A. I saw her every night.

Q. Now, I show you this picture, Mrs. Reddick, and ask if you can identify Mrs. Showalter in that picture?

A. Yes, I can.

Mr. BUTCHER: Now, your Honor, I object to the leading questions asked by Mr. Cooper. He should have asked that question—handed her the picture and asked her if she recognized anyone on there, and have her tell. He asked her if she could recognize Mrs. Showalter on the picture, and she said "Yes, I can". Now, those are leading questions, your Honor.

The COURT: Well, but the question of a witness, whether she can recognize a certain person in a group, is certainly not a leading question. If he pointed to her or if  
198 she was the only person in the picture, why that would be true. The objection is overruled.

Q. Can you identify Mrs. Showalter in that picture?

A. Yes, sir.

Q. Will you take this pen and put an X at the feet of the person that you recognize as Mrs. Showalter?

Mr. COOPER: We offer the picture in evidence.

Mr. BUTCHER: No objection.

The COURT: It may be admitted and marked Plaintiff's Exhibit No. 7.

Q. I would like to show you Plaintiff's Exhibit 6, Mrs.



Reddick, and ask if it appears to be anything you have ever seen before?

A. Well, I don't know just how you mean that. That is a pair of glasses. I have seen lots of them.

Q. Well, have you ever seen anyone that you know wear that pair or a pair similar to that?

A. Yes.

Q. Who?

A. Well, I don't know whether I get your question or not. Mrs. Showalter wore glasses of that type, if that is what you mean.

Q. And now I show you Plaintiff's Exhibit 5 and ask you have you ever seen any of your acquaintances wear shoes that appear to be the same as those shoes?

199 A. Yes, Laura wore a pair of shoes like that, wore them to work, and I saw them a good many times.

Q. Now, Mrs. Reddick, do you know whether or not Mrs. Showalter worked on Saturday, the 30th day of July?

A. No, I don't know whether she did or not.

Q. Was she in the habit of working quite steadily, so far as you know?

A. She never missed work but one time in three years, and she wasn't able to even walk, and she took her vacation at that time and took a week off. That is the only time she missed in the three years that she worked for me, and she was never late to work.

Q. Do you know the approximate age of Mrs. Showalter?

A. Well, I know she told me how old she was. She said she was 54.

Q. Do you know where Mrs. Showalter lived?

A. Yes, she lived in the 500 block on East Eleventh.

Q. The 500 block on East Eleventh?

A. Yes.

Mr. COOPER: That is all.

Cross Examination.

By Mr. WEIR:

Q. Mrs. Reddick, drawing your attention to the glasses that you have just testified to, I believe you said that  
200 —withdraw the question. Drawing your attention to the shoe that you examined, I believe you said that Mrs. Showalter wore shoes of that type?

A. Yes.

Q. And you saw her wear shoes of that type?

A. The reason that I saw her wear those shoes so many times was that she used them to work in.

Q. And would it be possible that someone else could have had shoes of that same type, to your knowledge?

Mr. COOPER: Objected to as incompetent and immaterial.

A. Well, I imagine there was more than one pair sold.

Mr. WEIR: That is all.

Mr. COOPER: That is all.

(Witness excused.)

BAILIFF: Your Honor, is there any need for the last witness to remain?

Mr. COOPER: We have no desire that she remain.

Mr. BUTCHER: She may be excused, as far as we are concerned.

201 VIRGIL BARKDOLL, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

#### Direct Examination.

By Mr. COOPER:

Q. Will you state your name, please?

A. Captain Virgil Barkdoll of the Anchorage Police Department. I have been with them on or about three and a half years.

Q. And you were working in that capacity on August 1, 1949?

A. I was.

Q. Did you have occasion to investigate the death of a woman in the vicinity of Ninth and A Street?

A. I did, sir.

Q. Approximately what time did you arrive at the scene, Captain?

A. I was called at home at exactly 6:10. I arrived at the scene just as quick as I could get my clothes on and get down there, sir, which would take a matter of about twenty minutes.

Q. And what did you observe upon arriving there?

A. I observed a lady lying in the grass, a nude lady, then—correction there, sir—first I noticed a red shoe lying in the road, and from that point—that was about the middle of the road—I couldn't see the body, but then I walked over toward, that would be east from where the shoe was lying, then I could see part of a lady's hips above the

202 grass. I immediately kind of walked in a roundabout way to where I could see what it was, and told the boys not to touch anything until the photographer arrived.

Q. And now how long did you remain at the scene where the body was?

A. I was there approximately forty five or fifty minutes.

Q. Now, did you observe various articles?

A. Yes, sir.

Q. Will you enumerate what you observed at the time you were there?

A. I observed a red shoe lying about three feet from—it was her right foot, sir—I observed a hat laying approximately four foot from the body, that was in a mashed down position, a brown hat with a felt band and it had a hole in the side of it like you would stick in a—oh, a union pin or something of that type, but the pin was not in it, sir. Then on or about eight feet from that there was a pair of ladies'—well, I wouldn't say "ladies'", I didn't think "ladies'" at the time—but it was a pair of glasses, rimless, bifocals. They were lying with the face of the glasses toward the body, with the stems up, sir. That would be on the north side of a little path that was leading in toward the body from the road.

Q. That "little path" that you mentioned, was that well defined? Was that a beaten path?

203 A. No, sir, it was not. It had the appearance of someone walking through the tall grass and mashing it down.

Q. Now these various articles that you have spoken of, Captain, what eventually became of those articles?

A. They were picked up by officers and placed in a box, taken to the Police Station and forwarded on to the Marshal's office. Just a minute, sir—yes, they were taken and then sent right directly to the Marshal's office.

Q. Did you examine this hat that you mentioned at the scene of the accident, Captain?

A. I looked at it on the ground. I observed the hole in it. At that time the photographers hadn't arrived to take the pictures and I told the boys not to touch it till after the pictures was taken. The next time I saw the hat, Chief Stowell, Detective Wilson, Harry Schwartz—Sergeant Schwartz—and, I think, Hansen—he was with our Department at that time—they were standing in a circle and one of them had the hat in his hand, and they had the lining turned up this way, and at that time my attention was called to a number inside the hat, 1066 and three letters, that was HAB, and I also noticed at that time the threads that held the lining in, or thread, was broken.

Q. Captain, will you examine Plaintiff's Exhibit 3 and state whether or not you can identify that as the identical hat that was discovered at the scene of the crime?

204 A. Yes, sir, for one reason I can, is because this B here, it appeared that it might be a K marked over, and I took it into the F. B. I. boys personally myself to ask them if they thought that it might be a remodelled or a K made into a B, and they said it was.

Mr. BUTCHER: Now, just a moment... I object to anything this witness might have testified as to what somebody else said, as being hearsay.

A. I am sorry, sir.

The COURT: Objection sustained.

A. Yes, I also identified this hole in the band here, sir.

Q. Now, would you look at the lining and state whether or not you find the numbers in there to which you have just testified?

A. 1066; yes, sir.

Q. Do you know whose possession that hat has been in since your officers recovered it at the scene of the crime?

A. The United States Marshal, only what time the police-men had it, sir.

Q. Were you able to recognize the body of the lady that you discovered there that morning?

A. At the time I saw the lady there, she resembled a lady that used to walk by my place and talk to my little girl and my dog and me, in general, when she walked by there. Later, when her identification was taken out

205 of her right pocket, a little coin purse, the name Mrs. Laura Showalter showed up on the identification, and at that time I identified her as Mrs. Showalter.

Q. Now, in investigating the person responsible for the death of Mrs. Showalter, Captain Barkdoll, did you have occasion to question one Harvey Carignan?

A. Yes, sir.

Q. Well, what were the circumstances surrounding that part of your investigation?

A. We talked to him, after talking to him on another case, in my office. Well, at that time we talked to him—I don't remember the exact words, as to whether he knew anything about the Showalter case, and one thing another, and he stated that he knew nothing about it and only that he had heard something about it over the air and in the papers and radio, and one thing another, then I reached in my drawer right in front of me, pulled out this large photograph that we had made of this Mrs. Showalter laying in the grass nude, laid it out across the corner of my desk. Detective Miller was sitting on this side and C. F. D. Petersen on my right. Mr. Carignan was sitting to the front of me, and as



I laid the picture out, he raised forward in his seat and said "Oh, for Christ's sake, you are not trying to pin that on me, too, are you?" and I said, "Well, if you don't know what it is", I said, "How ~~do~~ you know what that is?" He said, "Well, it has been over the papers and the radio and everything else." He said, "I presume it is the lady that was murdered a few days back."

Mr. BUTCHER: Well, your Honor, I would like at this time to have this witness testify as to the period of time that he is testifying. So far his testimony is only that he had a conversation with Mr. Carignan. I think it is important to know now what period of time this occurred.

Q. Do you recall the approximate date, Captain?

A. Yes, sir, it was on the 16th of September.

Q. Now, Captain, was there any further conversation at that time about this picture between you and Mr. Carignan?

A. I would like to try and remember the exact words for you, sir. I can't remember the exact words there, but I can remember him asking me to put the picture away because, he said, it made him nervous.

Q. I show you Plaintiff's Exhibit—

Mr. BUTCHER: Now, your Honor, I object. If he doesn't remember the exact words then he has no right to pull words out of the clear blue sky and use them. If those are the exact words, there is no objection, but he says that he didn't remember the exact words, and he remembers it was something like "Take it away, it makes me nervous." That is not testimony.

207 Mr. COOPER: He testified that was the substance of what he said, if the Court please.

The COURT: Well, he can testify to his best recollection even though he doesn't pretend to be able to state the precise words used. That just merely goes to the weight of his testimony, not to its admissibility. Objection overruled.

Q. I show you Plaintiff's Exhibit 2, Captain, and ask if that is the picture you showed to Mr. Carignan, to which you just testified?

A. That is the picture, sir.

Q. Now, Captain, in the course of your investigation in this case, did anything take place with reference to Mr. Carignan being identified as the party responsible for this crime?

A. Yes, sir. On or about noon hour, on the day of the 16th, Officer Wilson and myself went to the Post, Fort Richardson, picked up Mr. Keith at his work out there where he fires boilers, brought him to the station, and

there was five parties lined up in the Police Station. Mr. Keith came in. The boys were lined up against the wall. It is hard for me to explain, but the wall in the Police Station. Mr. Keith came in from the east side of the station, went through the door, stood at the window, and he started looking at the people in line from the right to the left, just in this manner, and as he turned and when he came  
 208 to Mr. Carignan he just stopped and looked, and Mr. Carignan looked back at him, then I stepped back into my office and Mr. Keith followed me.

Q. Now, don't tell us anything that Mr. Keith told you.

The COURT: Unless it was in the presence of the defendant.

Q. Unless it was in the defendant's presence?

A. No, sir.

Q. Now, did you have an occasion <sup>later on</sup> to go back to the— where the body was found, at a time when Mr. Carignan was present?

M. K. M.

A. Yes, sir, September 19, in the afternoon, on or about 2:00 o'clock.

Q. And describe what took place at that time.

A. Mr. Twist, from the O. S. I., Detective Miller, Marshal Herring and Mr. Carignan went out from the Police Station in back of the station, got in Mr. Miller's private car. Chief Stowell and I went out and got in his private car, then we didn't see them any more until we was pulling up at the scene of the crime. Just as we pulled up in the south to the north on A Street, the other car with the officers and Mr. Carignan in it was travelling from the north to the south. They turned east in the alley, between Eighth and Ninth. They stopped their car. We stopped ours. Marshal Herring and Mr. Twist got out on the right side of the car. Detective Miller got out on the other side, on  
 209 the left, and Mr. Carignan got out. They stood around there. I couldn't tell what was said, but we watched them, in fact, I made the remark to the Chief, "Let's—"

Q. Just a moment.

Mr. BUTCHER: I object.

A. I am sorry.

The COURT: You must avoid if you can saying anything that was said, unless it was said in the defendant's presence.

A. I am sorry, sir. I watched the officers and Mr. Carignan. Mr. Carignan got out of the car and looked around in this manner, like looking up at the top of the houses and

down the alley, both ways, then the officers and the man started over toward where the body had been lying. Just before they got to where the body was lying, or had been lying, Mr. Carignan was in the lead. He pointed down to the approximate spot, as near as I could tell from where I was standing as to where Mrs. Showalter was laying. I could not hear what was said from where I was, but then he turned around and walked back, as near as I could tell, because the grass had been mowed, looking for more evidence, to the approximate spot where the shoe was found in the road.

Q. Now, Captain, at any time during your investigation did you find anything in the nature of a weapon or an instrument that appeared, from which you could determine whether or not it had been used in connection with the death of Mrs. Showalter?

Mr. BUTCHER: I object to that question, your Honor, as leading. The witness has been called upon to testify to what he found, when he visited the scene of the crime, and he hasn't testified as to any weapon. He testified to what he did find, including shoes, glasses and other items. Now the District Attorney is trying to get him to testify that he found a weapon.

Mr. COOPER: Now, if the Court please—

The COURT: That is an improper statement.

Mr. COOPER: We certainly object to Mr. Butcher stating as to what the District Attorney is trying to get.

The COURT: The statement is improper if it implies that the District Attorney is trying to induce the witness to say something to accommodate his case. Now, the fact that the witness did not relate anything about anything of the nature of a weapon does not preclude the District Attorney from calling his attention to it in order to remind him if he has forgotten it. Objection is overruled.

Mr. BUTCHER: Exception.

Q. Was anything in the way of a weapon, that might have been used in connection with this death, found at the scene of the crime, Captain?

A. There was no weapon picked up in my presence, and I saw no weapon.

Mr. COOPER: Could we have a moment, if the Court please? If the Court please, at this time may we have a recess?

The COURT: Well, shouldn't you finish with the witness first?

Mr. COOPER: Yes, we can, your Honor.

The COURT: Are you through with him on the direct examination?

Mr. COOPER: Not quite, your Honor. There may be one or two more questions. I believe that is all, Captain.

### Cross Examination.

By Mr. BUTCHER:

Q. Mr. Barkdoll, as near as you can recall then, you arrived at the scene of this alleged crime at / 6:30; is that correct? M. K. M.

A. I was called at home at exactly 6:10, because I always look at my clock, and just as quick as I could get my clothes on, sir, I was there. It would take on or about twenty minutes.

Q. Well, that would fix the time at 6:30, would it not?

Mr. COOPER: If the Court please, we object to the question as based on something not in evidence. There has been no testimony whatever as to the time it took Captain Barkdoll from the time he received the call to the time he arrived at the scene.

The COURT: Well, when did you say you received 212 the call?

A. At exactly 6:10, sir. I always look at my clock.

The COURT: Well, it seems to me that the question is merely a recital in substance of what has been testified to. Objection overruled.

Q. You may answer, Mr. Barkdoll.

A. Just as quick as I could get my clothes on.

Q. Well, was the time about 6:30 when you arrived?

A. Approximately; yes. I would say it would take seventeen, eighteen, twenty, twenty one, twenty two or three minutes to get down there, but I don't know exactly, Mr. Butcher.

Q. You went there alone, did you or did someone pick you up?

A. I went in my own car, sir.

Q. When you arrived there who was present?

A. Sergeant Schwartz, Mr. Wilson and Mr. Keith.

Q. And Mr. Keith?

A. Yes, sir.

Q. And you state that when you—you drove up in your own car, is that correct?

A. Yes, sir.

Q. And where did you park your car?



A. Just a trifle south of where the shoe was lying in the road, sir.

Q. That would be on A Street?

A. Yes, sir.

213. Q. Would it be on the far side of the road from the park, where the scene of the crime was?

A. No, sir. I was travelling from the south to the north, and that would put me on the east side of the street, sir, on the side on which the body was lying.

Q. And when you got out, you got out into the road?

A. That is correct; yes, sir.

Q. And the first thing you saw was the shoe?

A. I walked up the road a little ways to where the shoe was lying on the street.

Q. I believe you testified that the shoe was approximately in the middle of the road?

A. That is absolutely correct; when I first saw the shoe, I would say as near—well, I didn't measure it, Mr. Butcher, but it was as near the middle of the road as I could tell.

Q. Well, that is close enough. Now, standing where the shoe was, looking over into the park, did you not say that you could not see the body?

A. I could not see it from that position, sir.

Q. From where the shoe was?

A. That is true.

Q. You then walked, after you examined the shoe, you walked towards the scene of the crime, is that correct?

A. That is right, over toward the edge of the road.

Q. And did you stop anywhere before you got into the grass?

214. A. Yes, sir.

Q. Where did you stop?

A. I stopped at approximately the edge of the road there. I could see the hips and part of a nude body.

Q. From the edge of the road?

A. That is true, sir.

Q. Now, you also saw what you described as an appearance of someone walking through the grass?

A. That is true.

Q. Now, from your own observation, do you know whether that trail or that swath through the grass, was caused by the officers or those people who were present when you got there, walking to the body, or by someone else?

A. No, I couldn't testify to that because I wasn't there at the commencing of it.

Q. All you know is that there was a trail through the grass?

A. Yes, that is right.

Q. And the trail was a fresh trail?

A. That is right. I wouldn't say it was fresh, it just had the appearance of grass being mashed down. I wouldn't say exactly how long it had been there, Mr. Butcher.

Q. Now, then, you yourself walked down on it?

A. I didn't walk down that trail. I walked from where I was standing around to the alley, almost to the alley, so I wouldn't disturb anything that might be along this  
215 path, or disturb the path or anything, over to where I could see.

Q. Did you have any particular reason for not walking along the path?

A. Certainly.

Q. You didn't know at that time that the path had not been made by the officers, did you?

A. Well, in an officer's own mind, when you come to the scene of a crime that way, naturally you try to preserve anything that is in evidence when you get there.

Q. So then you made a new path at the scene of the crime?

A. Well, at this point where I went in the grass was very shallow from the alley side, that is one point where the grass was shallow, Mr. Butcher. That is why I picked that.

Q. What was the first thing you saw when you got in the area of the mashed down grass?

A. The body.

Q. Just the body?

A. Yes, sir.

Q. And it was later that you observed this pair of glasses which you have described?

A. Detective Wilson called my attention to the glasses, sir.

Q. So far as you know, you don't know who the glasses belonged to, do you?

216 A. No, nothing only that they resembled the glasses that this lady wore that used to talk to my little girl, and I have no definite way of proving who they belonged to.

Q. ~~You have no~~ identification of peculiarity of glasses that would lead you to believe that they belonged to Mrs. Showalter?

A. They were bifocal glasses, and I noticed Mrs. Showalter did wear bifocal glasses, although there were several pair of glasses around her house.

Q. Where is your house, Mr. Barkdoll?

A. My house, at that time, was 342 East Ninth.

Q. 342 East Ninth?

A. Yes, sir.

Q. You don't live there at the present time?

A. I do not.

Q. You lived there on the 31st day of July or the 1st of August?

A. No, sir. I moved from there in June.

Q. Then it was prior to June that you had these conversations with Mrs. Showalter?

A. Yes, sir. She used to come by and talk to my daughter and my dog and me.

Q. Did you know at that time who she was?

A. I don't remember whether she introduced herself or whether my little daughter told me that her name was Mrs. Showalter. I don't remember, but she was awfully friendly and she used to call my little girl "Goldilocks". She was a nice old lady. She talked to the little girl quite often, and I was building a house and she was interested in that.

Q. What time of day would you say she usually appeared?

A. Oh, she stopped there all times of the day. I couldn't recall the exact days, possibly in the evening, maybe in the morning, maybe around noon. I worked on the house at all different times.

Q. What shift did you have?

A. At that time I was working a broken shift, sir. I was Lieutenant of traffic. Sometimes I would work days, sometimes I would work day and night, sometimes I would be off a day or two.

Q. Do you know where she lived at that time?

A. She lived in the direction of the Peacock Laundry; only from what my little daughter told me at the time did I know where she lived. She said she lived in the back of the Peacock Laundry.

Q. Now, while you made the observation you testified to about the body and its presence in the grass, did anyone else arrive?

A. Chief Stowell arrived just shortly after I was there, and also the photographer and Deputy Marshal Hoff.

Q. Did the photographers arrive then after you and Schwartz and Wilson and the Chief had arrived?

A. Well, they were there when I came, sir, so I couldn't state exactly when.

Q. Well, the Chief wasn't there, was he?

A. No, he was there at just approximately the same time, in other words, I just got there and the Chief pulled his car up behind me, just a few minutes. I don't know the exact minute, but just a short time.

Q. And then the photographers arrived. About how long were the photographers present?

A. How long was the photographer present? You mean at the crime scene?

Q. Yes.

A. Oh, around forty five or fifty minutes. Now, wait a minute. He could have been there when I left, because after about forty five or fifty minutes I went back home, sir, to finish dressing, because the boys had notified the undertaking parlor and they were on their way down to pick up the body.

Q. Was anything shifted or moved, any arrangements made with the photographers?

A. As far as I know, there was nothing moved before the pictures was taken, because that is strict orders that I have that nothing is to be touched at the scene of a crime until the photographer arrives.

219 Q. Were you the officer in charge at the scene of the crime?

A. I was until the Chief arrived.

Q. Now you have testified as to the various items that you saw there. Later on in your testimony you said that you reached into the purse. Now, where did this purse come from?

A. It came out of her pocket. It was a little coin purse, a snap-type.

Q. Was this purse removed at the scene of the crime?

A. It was removed right after—well, while the evidence was being picked up.

Q. Who removed the purse?

A. I removed the purse from the pocket myself in the presence of Marshal Hoff.

Q. At the scene of the crime?

A. And the Commissioner was there, too, sir, because we always remove valuables in the presence of the Commissioner.

Q. Well, now, did you know what was in the pocket?

A. No, I didn't know what was in the pocket.

Q. Then what do you mean, "the Commissioner is always present when you remove—"

A. What I mean, the Commissioner is always present



when we search a body, in case there is money or anything on the body, we want a witness.

Q. Did this searching of the body occur out at the scene of the crime or elsewhere?

A. Right where the body was lying, sir, and we were looking also for identification, of course.

Q. Did that occur at the time the pictures were being taken?

A. That occurred after the pictures were taken.

Q. After you had left and returned?

A. No; the pictures was taken when Mr. Moore arrived at the scene of the crime. That was the first thing that took place. Then later, while the evidence was being picked up and placed in the box, and one thing another, and the body was searched.

Q. Mr. Barkdoll, haven't you testified previously that the parties who were present at the scene of the crime during the time that you were there, you have named them and you haven't said the United States Commissioner was there, have you, previously?

A. Sir, that is an oversight on my part, because she is always called immediately at the scene of a crime. If I overlooked that, I am sorry.

Q. Well, do you know then, the sequence of her arrival at the scene of the crime?

Mr. COOPER: Objected to as immaterial.

The COURT: Objection sustained.

Q. You needn't answer that question. Do you know if she was present at the scene of the crime during the entire time you were there?

A. No; no, she wasn't there the entire time I was there. Her and Dr. O'Malley came on or about the same time, and that was just about the time, shortly after or right about the time, the Chief and—

Q. Well, now, Officer Barkdoll, you haven't testified previously that Dr. O'Malley was there. Was Dr. O'Malley there too?

A. Probably the reason I didn't, is because I more or less figure it is taken for granted that that is the first thing we do at the scene of a crime, is to call the physician and the coroner, Miss Walsh.

Q. Well, now, at this time, do you remember any other oversights that you might have made?

A. No, sir, other than of right at the time that Miss Walsh might M. K. M.  
called for coroners or for people to come out that / be  
called at an inquest. Just at the time I was leaving there  
was some neighbors came out of the house and they were  
talking about that. I don't remember their names.

Q. Well, now, back to the purse. You say that you took  
the purse out yourself?

A. I did.

Q. And in the presence of these other parties?

A. Yes.

Q. And did you open the purse at that time?

222 A. I did.

Q. Can you describe the color of the purse?

A. If I remember correctly—I can't, not the exact color,  
but I remember that it had the little snap-type with the two  
balls that passes one another, you know, for a latch.

Q. Do you remember what became of the purse?

A. It was in the box that was sent to the Marshal's office.

Q. Did you put it in the box?

A. No, sir.

Q. Now the contents of the purse—you said there was a  
little card?

A. Yes, sir.

Q. And on the card was a name?

A. Laura Showalter; the card was from the Co-op at  
Anchorage, Alaska, she owned shares in the Co-op and  
there was fifty five cents in coins in the purse.

Q. Now, was it upon reading that name that you recalled  
that this was the woman who—

A. The woman who had passed my place, I remember the  
name.

Q. But at that time she talked to you previously at your  
place, I believe you testified that you didn't remember  
whether you knew her name or not, or whether she had  
ever stated it, is that not correct?

A. No; I don't know whether she stated it or my little girl,  
but I know my little girl, at times we talked, said that  
223 it was Mrs. Showalter, and I remembered her as  
Mrs. Showalter.

Q. How old is your little girl?

A. My little girl is eleven years old.

Q. Now, you have described or you have detailed an epi-  
sode that occurred at the Police Department and a conver-  
sation that you had with Mr. Carignan?

A. That is true, sir.

Q. Now, you stated in your conversation with Mr. Carignan, in referring to a murder, he said something like, "this murder occurred a few days ago". Is that correct, did you say that?

A. I don't remember whether he said a few days or several days.

Q. Did you testify that he said "a few days ago"?

A. Several days ago.

Q. That is your testimony. Now, isn't it a fact that these observations that you have testified to at the scene of the crime occurred about six weeks before that?

A. Fifty one or two days.

Q. You had Mr. Carignan in the Police Station at this time?

A. Yes.

Q. And you stated that you showed him this picture of the nude body?

A. Yes, sir.

224 Q. And you have also stated that upon seeing it, he told you in words to this effect, that it made him nervous?

A. That is right. He asked me to put it away.

Q. Did he say anything else at that time which would indicate why the picture made him nervous?

A. I remember saying to him, "If you don't know anything about it, why should it make you nervous?"

Q. Had you said anything to him prior to his remark about this nervous condition?

A. The picture was first laid out there and the remark was made, and I asked him how he should know or why he should know what that was, and he said "Well—"

Q. Well, what do you mean by "That"?

A. The picture; and he said, "Well, it was over the radio and in the newspapers" and so on and so forth.

Q. And did you have any further conversation before he made the remarks? Had you accused him at this time of committing this crime?

A. No, I had not accused him of it. Between the officers, the three of us in there, the remark was passed back and forth asking him if he knew anything about the Showalter case, or if he knew of it, and so on and so forth.

Q. And he denied that he knew anything of it? Didn't you testify that he said he didn't know anything about it?

225 A. Other than what he read in the papers, and so on and so forth.

Q. You had been discussing with Mr. Carignan at that time the possible commission of another crime, had you not?

A. I had been talking to him before that in regard to the Christine Norton case, sir.

Q. And didn't you suggest to him at this time, the time that you were showing him this picture, that the man who commits one crime would commit another crime?

A. If I did, I don't remember it, Mr. Butcher.

Q. And it was at this point that you showed him the picture, is that not correct?

A. I don't remember the remark. I can remember taking the picture out of the drawer and laying it in front of him, but I can't recall of ever saying that.

Q. But you very clearly remember his remark about the nervous condition?

A. Yes, because I thought it was peculiar that it would make him nervous.

Q. Did anyone else tell you that it made them nervous to look at that picture?

A. No, sir.

Q. Carignan was the only one?

A. Carignan was the only one that told me it made him nervous to look at that picture.

226 Q. Now, you testified as to a later occurrence, where several of you visited the scene of the crime in the presence of Mr. Carignan?

A. That is right, sir.

Q. Now, you have testified that you saw a group of men, including Carignan, and the Marshal?

A. That is right, sir.

Q. Approach the scene of the crime and where were you at that time?

A. Sitting south of the alley, between Eighth and Ninth, on A Street, facing north, in Chief Stowell's car.

Q. In Chief Stowell's car?

A. Yes.

Q. How far away from the group were you in feet?

A. Oh, between seventy and eighty five feet, I couldn't say exactly.

Q. Did you have your police radio on?

A. We never have a police radio on in that car, because it has no radio.



Q. You were watching the group?

A. That is right. We got out of the car while—just shortly after they got out, why we got out of our car.

Q. Now, could you hear any conversation going on between them?

A. None whatsoever.

Q. Now, you testified that Mr. Carignan lead the way.

Now, do you know of your own knowledge that he  
227 lead the way, or that he was told to proceed through the grass?

A. I can tell you my exact testimony. Marshal Herring, Detective Miller—or Mr. Twist—got out of the right side of the car. Mr. Miller got out the left. Mr. Carignan got out the same side as Marshal Herring and Mr. Twist. Mr. Carignan got out and looked around at the tops of the buildings, down the alley this way and then back to the east, then the group started to move toward where this body had been lying, and just before they got to where the body was lying Mr. Carignan was in the lead. He walked over and pointed to the approximate spot where the body was lying, and they stood there for just an instant and looked back toward the road and walked almost the exact route, the way the body had been taken in originally, and walked out to the road to the approximate spot where the shoe was found in the road.

Q. Now, the question, Officer, is that you, not being able to overhear the conversation, you don't know whether Mr. Carignan was leading or whether he was being directed to proceed to these spots, do you, of your own knowledge?

A. Of course not, absolutely not. I don't know, I couldn't hear.

Q. Your assumption that Mr. Carignan was leading and that he walked over and pointed to this spot, is just a mere assumption on your part, is it not?

228 A. No, it is not, because he was in the lead of the group.

Q. But yet you have testified that you couldn't hear any of the conversation?

A. That is true, sir.

Q. And you don't know of your own knowledge when they arrived at the location of the body or where the body had been, that he was not directed to walk out into the road where the shoe was?

A. I know nothing about that.

Q. So that as far as you know, he could have been acting entirely under the direction of the Marshal or some other officer, could he not?

A. As far as I know he could have. I don't know.

Q. When did you first pick Mr. Carignan up?

A. I didn't pick him up.

Q. Do you know who picked him up?

A. Mr. Petersen of the O.S.I., or C.I.D., I mean.

Q. Do you know what day that was?

A. It was on the morning of the 16th.

The COURT: When you say "C.I.D.", maybe you better say what that is an abbreviation for. The jurors probably don't know.

A. That is the Civilian—

The COURT: If you know—if you don't know, why—

A. Well, it is the Civilian Investigation Department at the Post. They investigate civilian crimes and so on and so forth, at Fort Richardson, sir, and assist us boys in crimes where soldiers are involved.

Q. What do you mean by "O.S.I."?

The COURT: Well, he corrected that to C.I.D., so it makes no difference what he meant by O.S.I.

Mr. BUTCHER: But he used the expression "O.S.I." several times.

The COURT: I thought he corrected himself now and substituted C.I.D.

Q. Is there a difference between O.S.I. and C.I.D.?

A. Practically the same thing, only C.I.D. investigates just the Army, and the O.S.I. investigates crimes that is committed in the Air Force.

Q. In your business here, business involved in connection with the case, did you contact both the offices of the O.S.I. and C.I.D.?

A. We certainly did, sir, many, many times.

Q. So that when you used the expression "O.S.I." you refer to a particular type of officer?

A. Yes, sir. I have worked with them ever since I have been in Alaska.

Q. Now, do you know what O.S.I. means?

A. It is Officers and Civilians, I know that, but what the "I." is—Office of Civilian Investigations.

Q. Do you know what A. P. D. means?

A. Yes, sir.

Q. Now, from your own knowledge, when was Mr. Carignan picked up?

Mr. COOPER: If the Court please, I believe the testimony has been given that he was not picked up by this officer.

The COURT: What is the question?

Mr. BUTCHER: The question is, from his knowledge, when was Carignan picked up?

The COURT: Objection overruled.

A. I don't know.

Q. Your answer is you don't know. When did you first see him?

A. The forenoon of the morning of the 16th, the forenoon.

Q. The forenoon of the morning of the 16th?

A. That is right.

Q. And in whose custody was he when you first saw him?

A. Mr. Petersen, of the C. I. D.

Q. Do you know whether Mr. Peterson had arrested Mr. Carignan or not?

A. I don't know, but I was told he hadn't.

Q. Do you know what action was taken with regard to Mr. Carignan after you finished your interview with him?

A. Yes, sir.

Q. What happened?

231 A. He was placed down in the other room for a period of, oh, I don't know, two or three hours. He sat around and waited.

Q. What other room do you refer to?

A. I am referring to more or less the lobby there in the Police Station, sir, on a bench, and, oh, around 4:00 o'clock or shortly after, around 4:30, why Marshal Drew came over with a warrant for he, Davis and Lloyd's arrest, and then they were brought before the Commissioner and arraigned.

Q. Now, do you know what this arrest was, was this arrest for the Showalter matter?

A. No, sir. The Christine Norton case.

Q. Was he then released into the custody of the United States Marshal?

A. Well, he wasn't released because he hadn't been placed under arrest. They just came over and arrested him in the Police Station.

Q. But they took him out of the Police Station?

A. That is correct.

Q. Now, Mr. Barkdoll, isn't it a matter of fact that he was detained in the Police Station for two or three days?

A. No.

Q. That is not true?

A. No.

232 Q. And you know that of your own knowledge?

A. Detained in the Police Station two or three days?

Q. Confined in the Anchorage Police Station for two or three days?

A. No; definitely not true; no. He was asked to stay there. The man, so far as I am concerned, could have got up and walked out during that day.

Q. He could have got up and walked out at any time?

A. As far as I am concerned.

Q. Well, Mr. Barkdoll, if the records of the Anchorage Police Department shows that he was detained there for two or three days, you would be incorrect in your present statement, would you not?

Mr. COOPER: Well, now, if the Court please, we would like to have the time determined, two or three days before this or two or three days after this?

The COURT: Yes. The time has not been fixed, whether it was before or after this arrest or arraignment.

Q. You testified, Officer, did you not, that the morning you interviewed him was the 16th day of September?

A. That is right.

Q. Now, the question is, isn't it a fact that you detained him in the Police Station for two or three days?

A. We did not.

Q. After that day?

233 A. We did not. The only reason the boy wasn't brought over to the Marshal's jail was because they did not have adequate room for him. We were asked to keep him over there.

Q. That was on the 16th of September?

A. That was on the evening of the 16th that we were asked to hold him for a day or two.

Q. Oh, you were asked to hold him?

A. By the Marshal, after he had been arrested and arraigned.

Q. Then when you said that he was free to go at any time, and you wouldn't have stopped him, weren't you in fact holding him for the Marshal's office?

A. At no time was I holding him.

Q. Didn't you just testify that you were asked by the Marshal's office to hold him?

A. That was on the evening of the 16th, what I am speak-



ing of was previous or prior to that. It was before, before the boy was arraigned, that he was allowed to sit in the Police Station on a bench and he was asked to stay there.

Q. Did you accompany him to the arraignment?

A. I did not.

Q. Did you see him anymore after that?

A. I can't recall if I saw him the next day or not.

Q. Do you know where he was confined after the arraignment?

A. Yes—no, not the first night, I don't know, but I do from there on out.

234 Q. Where was that?

A. In the ladies' quarters of the jail. The ladies were transferred to—Marshal Herring suggested, or stated to me over the telephone that Mr. Carignan would like to have a cell by himself. We moved the ladies from our jail, two of them, over to the Marshal's jail so he could have the ladies' quarters, which is a lot nicer and cleaner place for a prisoner, and there was a sign put on the door and every officer was advised not to bother him, to leave him alone.

Q. Now, one other question, Officer, and I think that I will have nothing further. During this day of the 16th, other than this examination that you made of Mr. Carignan and the picture you showed him, did you leave him alone as far as you were concerned, the remainder of the day?

A. I didn't question him anymore that day.

Q. You didn't question him anymore that day. You are sure of that?

A. Oh, let me think. We might have talked to him—no. I didn't. The other officers may have. I may have talked to him four or five minutes or maybe ten minutes after that, just in regard—

Q. What did you talk to him about?

A. Oh, in regards to this case. Nothing that is significant, that I can remember.

235 Q. About this locating of the body?

A. That is right; the Showalter case.

Q. Now, you are sure you didn't bother him any further on that day?

A. I, myself, didn't.

Q. Didn't you testify here in a previous case, Mr. Barkdoll, that on the 16th day of September you had Mr. Carignan in your office and took a statement from him about Christine Norton and had him put—

A. Well, I am sorry, I was referring to this case. If you

put in that case, yes, we did talk to him about the Christine Norton case. We got a statement from him that day, sir, on that forenoon.

Q. Well, now, that consumed a good part of the day, did it not?

A. No, it couldn't have, because I went to the Post on or about noon, sir.

Q. You remember Mr. Carignan's exact words with reference to this picture, but your recollection as to what else happened on that day—

Mr. COOPER: Well, now, if the Court please, I don't think there is any evidence in here that he remembered Mr. Carignan's exact words. The testimony is that he couldn't remember his exact words.

The COURT: Well, it is argumentative in form, and  
236 objection will be sustained.

Mr. BUTCHER: Withdraw the question and turn the witness back.

Mr. COOPER: May we have just a moment, your Honor? That is all.

Mr. BUTCHER: I would like to ask one other question, your Honor, something we have overlooked.

Q. Mr. Barkdoll, at the scene of the crime, as you have detailed it, isn't it a fact that the presence of the police officers and the apparent excitement going on there brought a lot of people to the scene of the crime during this period of time, a lot of curious people who stopped their cars and came across the park?

A. Mr. Butcher, other than the people and the officers I was directly working with and the few parties that came out at the time, Miss Walsh asked someone to be brought in from the nearby neighborhood, or something to that effect, that might appear at the inquest; if there was anyone else came up to the outside edge my boys undoubtedly kept them back and I didn't pay too much attention to them, so I wouldn't say whether there was or wasn't.

Q. As far as you know then, from your own observation, there were not a lot of people tramping through the grass?

A. That is right. I was interested in the crime scene.

Mr. BUTCHER: No further questions.

237 Mr. COOPER: That is all.

(Witness excused.)

WHEREUPON Court recessed for five minutes, reconvening, as per recess with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:

T. H. MILLER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

By Mr. COOPER:

Q. Would you state your name, please?

A. T. H. Miller.

Q. And by whom are you employed?

A. City of Anchorage, Police Department.

Q. And were you so employed on the 1st day of August, 1949?

A. I was.

Q. And you have been employed from that—ever since that date up until the present time?

A. Yes, sir.

Q. Did you have occasion to be with any other officers in the presence of Mr. Carignan in the vicinity of Ninth and A, subsequent to the 1st day of August, 1949?

A. Since that date; yes.

Q. Do you recall the approximate date that you went there?

238 A. It was on the 19th.

Q. Of what month?

A. Of August.

Q. Of August or September?

A. September, pardon me.

Q. Now, Officer, who went with you out to the scene of the crime.

A. Marshal Herring and Kenneth Twist, special agent for the O. S. I., and Mr. Carignan.

Q. And yourself?

A. And myself.

Q. And now, describe what happened when you arrived at the scene?

A. I drove down C Street to Ninth, down Ninth to A, and back up to A, to the alley.

Mr. BUTCHER: That is not responsive to the question, your Honor.

The COURT: What was the question again? By the way, though, the objection "not responsive" is not available to anybody but the party questioning. You will have to object on some other ground.

Mr. BUTCHER: But he is giving an answer, your Honor, that is not responsive.

The COURT: But the objection is only available to the party examining, so the objection is overruled.

239 Q. What took place upon your arrival—withdraw the question. Do you know under what circumstances Mr. Carignan accompanied you to the scene of the crime?

A. Mr. Herring asked Mr. Carignan if he would go to the scene with us.

Mr. BUTCHER: Now, just a minute. Mr. Herring can speak for himself. Anything Mr. Herring said is hearsay and objectionable.

Mr. COOPER: Not under the circumstances, your Honor. It was in the presence of the defendant and this man was a witness to it. He can certainly testify to the circumstances under which Mr. Carignan accompanied them to the scene.

The COURT: Objection is overruled.

A. Mr. Herring asked Mr. Carignan if he would mind going to the scene and see if he could identify the spot where this crime took place. Mr. Carignan agreed to do that. When we pulled up at the scene Mr. Herring, Mr. Twist and Mr. Carignan got out of the right side of the car, which was next to the lot, at the scene of the crime, and I got out on the left side, and I come around the car. They just started to move out to the center of the lot and Mr. Carignan pointed down to a spot in the lot which was within a few feet of the spot where the body was found. He then turned and walked out to A Street to the approximate spot where the shoe was found in the street. He said "This is  
240 where I first grabbed her and hit her." He said, "I put her under my arm and carried her to the center of the lot."

Q. At the time that he pointed to the center of the lot, that you have just described, did he make any statement at that time?

A. He talked to Mr. Herring, but I did not hear the conversation.

Mr. COOPER: That is all.

Cross Examination.

By Mr. BUTCHER:

Q. What day was this?

A. 19th of September.

Q. 19th of September, and you were driving the car that went to the scene of the alleged crime?

A. Yes, sir.



Q. And in the car was Mr. Carignan, Mr. Herring and Mr. Twist?

A. That is right.

Q. And no one else?

A. Not in my car.

Q. Was there any other car that went out at that time?

A. Chief Stowell and Captain Barkdall came up in the Chief's car.

Q. Were they in the group?

A. Not right in the immediate group.

241 Q. Do you know where they were?

A. When I first noticed them they were out of the car, which was parked on A Street, standing at the edge of the lot.

Q. Where were you at that time?

A. We were at the center of the lot, approximately at the spot where the body was found. That is about where we were.

Q. Now, where you parked your car, you have detailed that you got out on the one side and who got out on the other side. Now, when you all got out, was there any conversation?

A. There was conversation on the other side of the car which I did not hear. I don't know what was said.

Q. You don't know what was said?

A. No, sir.

Q. The next thing you know, Mr. Carignan walked off toward the center of the lot?

A. We all walked off, with Mr. Carignan in the lead.

Q. You don't know whether the conversation that occurred on the other side of the car was instruction to Mr. Carignan to proceed to the center of the lot, do you?

A. I stated that I did not overhear the conversation.

Q. When you got to the center of the lot, was there any conversation?

A. There was.

Q. What occurred there?

242 A. Mr. Carignan pointed at the spot in the lot where the body was found.

Q. Well, was there any conversation? I don't care whether he pointed or not, did he say anything or did anyone else say anything?

A. Mr. Carignan said something; yes.

Q. Well, what did he say?

A. I didn't overhear it, and I so stated.

Q. Oh, you don't know what was said. Was there any other conversation?

A. I didn't hear any conversation until Mr. Carignan got out to the road on A Street, where he said that "This is the spot where I first hit her."

Q. You followed him out there, did you?

A. Yes.

Q. Did anyone else go to the middle of the road?

A. To my best recollection, everybody did, Mr. Twist, Mr. Herring, myself and Mr. Carignan.

Q. Well, what about the other officers, who, by the time you reached the middle of the lot, were standing on the edge of the grass—did they accompany you?

A. They weren't with us, in that particular group. Now, where they were at the time we got to the street, I don't know.

Q. Well, now, isn't it a fact if they were standing  
243 on the edge of this lot, they were standing near the location of this shoe?

A. It would have been somewhere near; yes.

Q. And from your recollection, where was the shoe, as far as its proximity from either side of the road?

A. It would be on the side towards the lot.

Q. On the side towards the lot?

A. Yes, sir.

Q. Within how many feet of the edge, do you recall?

A. I wasn't there at the original scene, at the original investigation.

Q. Now, you recall of where Mr. Barkdoll and the Chief were standing. Where was that with relation to the shoe?

A. I couldn't say at that particular time. I was paying no attention to that.

Q. Did you hear any other conversation at all other than the remark made by Mr. Carignan in the road?

A. He was questioned, I believe, by Mr. Herring, as to the shirt that he had told us he had disposed of, so then we got in the car and drove to the railroad crossing at the Fort.

Q. Now, let's finish what happened.

A. I heard no further conversation.

Mr. COOPER: Let's have his answer, your Honor.

Mr. BUTCHER: That is not responsive, your Honor.  
244 I am asking about what occurred here, at the shoe.

Mr. COOPER: What else was said? I believe that was the question, your Honor.

The COURT: I think that you asked him if there was any other conversation than that that he had related.

Mr. BUTCHER: That is correct, your Honor, and then he tells us how he went to the railroad station with Mr. Carignan, which is not in answer to any question.

Mr. COOPER: I believe his answer was something in connection with a shirt.

Mr. BUTCHER: I think if the question is read, your Honor—

The COURT: Well, you may answer whether there was any other conversation than that to which you have already testified.

A. There was. I am sure it was Mr. Herring asked—

Q. Now, just a moment. I asked if there was any other conversation. Now, was there or wasn't there?

A. Yes.

Q. There was. Now, was the conversation about the spot where the shoe was located?

A. Not to my knowledge.

Q. Do you recall anything else, Mr. Carignan might have said, there?

A. No.

245 Q. Was that his only statement?

A. Yes. He said in response to a question put to him by Mr. Herring, asking him if he would show us where he disposed of the shirt—

Q. What did he say to that?

A. He said he would.

Q. Did you return then to the scene of the crime, where the body had been?

A. We walked up to Eighth Street on A. Mr. Herring asked him if he would show him the route he took back to where he said he got a cab.

Q. I didn't ask you that.

A. I thought you asked me for conversation with Mr. Herring.

Q. I asked you if you returned to the scene of the crime, where the body was?

A. No, sir.

Q. You didn't?

The COURT: Well, returned from where? I thought he was testifying as to what occurred at the scene. In other words, I didn't know he had left.

Mr. BUTCHER: Well, we moved from the scene of the body and went to the road where a shoe was located, some

thirty or forty feet away. Now, from that point I am asking him if he returned to where the body had been located.

The COURT: I think he answered that, did he not?

246 A. I said no, I did not.

Q. You did not. Now, in all the time you were present out there, other than the conversation where—other than the words Mr. Carignan uttered about pointing at the shoe and the conversation about the shirt, you heard no other conversation?

A. That is all, I believe.

Q. So far as you know, you don't know whether Mr. Carignan was acting under someone else's instruction to go to these places, or whether he was going of his own volition, do you?

A. At the time he walked from the car to the center of the lot he was in the lead, and no words were spoken then as he walked out to the center of the lot.

Q. Well, there were words spoken on the other side of the car?

A. That is right.

Q. After he had gotten out?

A. Yes, sir.

Q. And you didn't overhear those words?

A. That is right.

Mr. BUTCHER: That is all.

247 Redirect Examination.

By Mr. COOPER:

Q. Mr. Miller, I believe you stated in response to Mr. Butcher's question that some conversation took place with Mr. Carignan concerning a shirt?

A. That is right.

Q. What was that conversation?

A. Mr. Herring asked Mr. Carignan if he would take us and show us to where he disposed of the shirt, and he said he would.

Q. And what did you do following that conversation?

Mr. BUTCHER: Now, your Honor, I object to that as not being proper re-examination. It should have been asked in examination in chief.

Mr. COOPER: It was brought out by the cross examination of the defense, your Honor.

The COURT: Yes. Objection overruled.

Mr. BUTCHER: Exception.

A. We got in the car and drove to the railroad crossing just this side of Gate No. 1 at the Post, where Captain



Barkdoll—he was in the Chief's car—he followed in behind me and my car. Mr. Herring and Mr. Carignan got out of my car and they walked down the railroad tracks and we met them within about fifteen or twenty minutes at Mr. Carignan's barracks.

Mr. COOPER: That is all.

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Recross Examination.

By Mr. BUTCHER:

Q. You state you went to the railroad yards?

A. We went to the railroad crossing this side of Gate No. 1.

Q. That is towards Fort Richardson?

A. Yes, sir.

Q. When you got to that point what did you do?

A. I stopped, and the Chief pulled up behind me in his car. Captain Barkdoll got out of the Chief's car and Mr. Herring and Mr. Carignan got out of my car and they walked up the railroad tracks.

Q. And they walked up or all of you?

A. Just the three.

Q. You didn't go?

A. No, sir.

Q. What occurred from there on you don't know?

A. No, sir.

Q. You didn't see them arrive at Mr. Carrignan's barracks?

A. We were in another barracks up there at the time.

Q. Well, now, when you stopped at the railroad crossing, is that the railroad crossing, that is just on the town side of the M. P. Station?

A. Yes, sir.

Q. There is no barracks there, is there, Officer?

A. No, sir.

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Q. When you got out of the car there and Marshal Herring and Carignan proceeded up the tracks in another direction, you didn't go with them, did you?

A. No, sir. I drove from there to the barracks up in the Post.

Q. You drove to the barracks? Do you know what barracks that was?

A. No, I don't. Mr. Twist directed me where to drive. He is acquainted at the Post.

Q. And you don't know where Mr. Carignan and the Marshal went, do you?

A. They later came up to the barracks.

Q. And where did they go then, that is the question?

A. They went—

Q. Of your own knowledge, if you know you tell us if you don't, don't tell us.

A. The direction that they went from there is all I know.

Q. That is all you know.

Mr. BUTCHER: That is all.

Mr. COOPER: That is all.

(Witness excused).

WHEREUPON the jury was duly admonished and Court recessed until 2:00 o'clock p. m. December 19, 1949, reconvening as per recess with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:

The COURT: You may call your next witness.

Mr. COOPER: Call Mr. Petersen.

Mr. BUTCHER: Your Honor, while the Court is waiting for the Government witness, I wonder if your Honor recalls at a quarter to two we were to make request upon the Court for the issuance of subpoenas for witnesses for the defendant, and we came in at a quarter of two, your Honor, but in examination of the rule providing for furnishing of witnesses for the defendant, we learned that it must be by affidavit. My own secretary was absent during lunch hour, and I was unable to obtain an affidavit. I wondered if the Court would set a time, perhaps sometime in the morning?

The COURT: The Court is willing to hear the matter at any time you are ready.

Mr. BUTCHER: Thank you.

GEORGE O. PETERSEN, called as a witness on behalf of the Government, being first duly sworn; testified as follows:

#### Direct Examination.

By Mr. COOPER:

Q. Will you state your name, please?

A. George O. Petersen.

Q. What is your employment or occupation, Mr. Petersen?

A. I am an agent of the Criminal Investigation Division of the United States Army.

Q. Is that what is commonly referred to as C.I.D.?

A. Yes, sir.

Q. Now, Mr. Petersen, do you know Harvey L. Carignan?

A. Yes, I know him.

Q. On the 16th of September, 1949, were you at any time during the day in the company of Mr. Carignan?

A. Yes, I was.

Q. Will you describe to the jury the circumstances under which you were together?

A. Approximately 9:00 o'clock in the morning of Friday, September 16, I got a telephone call which stated—

Mr. BUTCHER: Your Honor, I object to anything that might have been stated over the telephone without identifying who said it and if it is hearsay I want the opportunity to object to it.

The COURT: Well, you perhaps should state, unless the direct question is asked you, what you did and avoid saying what anybody said, unless the defendant was present when anything was said.

A. I was told—

Mr. BUTCHER: Now, I object to anything he was told, your Honor.

The COURT: You may say, as the result of a conversation you did so and so, if that is what you are trying to get at.

A. That is right, sir. As the result of a conversation over the telephone, the police wanted to speak to Harvey L. Carignan, and John J. Williams of Headquarters, Headquarters Company. I contacted the Company Commander of Headquarters, Headquarters Company, and asked him if these men would be available and go to town to answer the questions the police wanted. Approximately 11:00 o'clock or thereabouts, we arrived at the Police Station.

Q. And now, was Mr. Carignan, at the time he accompanied you to the Police Station, under arrest or restraint of any kind?

A. No, sir, he wasn't.

Q. Now, upon arrival at the Police Station, what took place, Mr. Petersen?

A. Carignan was placed in a line-up with four other men and was identified by Mrs. Christine Norton as the man who—

Mr. BUTCHER: I object to anything, your Honor, that might have occurred in connection with Mrs. Christine Norton.

The COURT: Yes, the objection is sustained.

Q. And, did you later on have any conversation with Mr. Carignan personally?

A. Yes, I did.

Q. And did he make any statements to you in that conversation with reference to the Showalter case?

253 A. He told me his activities of the day of July 31st up to approximately the time of a purchase of a gun in the evening and asked me to check his story to bear out all he had been doing that day.

Q. Now, did he make any statement—incidentally, Mr. Petersen, did you have any conversation with him before he made this statement relative to his rights as to whether or not he was required to make a statement?

A. I don't remember the exact words, but I think that I told him that there was nobody but himself who could help him, if he wouldn't tell us where he was. There was nobody that

M. K. M.

could make him tell us or anything like / there was nobody in the Police Station that could make him make a statement, but if he wanted my help I would have to have something to go on.

Q. Then, following that, then he made the statement to you?

A. Yes.

Q. Now, did he make any reference to anything with reference to the clothing he was wearing?

A. Yes. He described the clothing he was wearing that day and as having on a pair of blue jeans and a light blue shirt, which he stated the sleeves were too short for him and he had to roll them up to just below the elbows, and that is why he definitely remembered he had on a blue shirt; however, checking his story with witnesses, I found  
254 out that particular day he was wearing a khaki shirt.

Mr. BUTCHER: Now, your Honor, any evidence he obtained by examination of other people is not admissible, not competent.

The COURT: Yes, that is correct. Objection to that is sustained.

Q. Now, did you have any subsequent conversation with him relative to the shirt, Mr. Petersen, after that day?

A. With Carignan?

Q. Yes.

A. No, sir, I did not.

Q. Did he ever at any time tell you that—

Mr. BUTCHER: Now—I am sorry.

Q. Did he ever at any time tell you that he had been mistaken about the color of the shirt that he had previously described?



Mr. BUTCHER: Before you answer that, I object to that, your Honor, on the ground that it is leading.

The COURT: It is leading. You might direct his attention to the shirt, but avoid—

Mr. COOPER: Withdraw the question.

Q. Did you have any subsequent conversation with Carignan relative to the shirt?

Mr. BUTCHER: Now, I object to that, your Honor, on the ground that he is suggesting to him the answer that  
255 he is to make by asking if the conversation is in connection with the shirt.

The COURT: Well, I don't know how he would get at a conversation about a shirt except by calling attention to a shirt. Now, this question is certainly not leading, and objection is overruled.

A. Could I have the question again?

Q. Did you have any conversation after this one you have spoken of with Mr. Carignan, relative to this shirt?

A. I might have, but I don't recall it right now.

Q. Mr. Petersen, by virtue of your position in the Army, do you have any knowledge of your own as to various classes or instructions or Articles of War, or anything of that nature, that by which members of the Armed Forces are advised of their various rights?

A. Oh, yes.

Mr. BUTCHER: I object again, your Honor, that the District Attorney can ask questions in chief, asking what the witness knows, but not continually suggest to him the things that the District Attorney wants to bring out, by suggesting these answers to him.

The COURT: Well, it is not clear to me just what the ground of objection is, and I don't even recall the question clearly. Will you repeat the question?

Court REPORTER: "Mr. Petersen, by virtue of your  
256 position in the Army, do you have any knowledge of your own as to various classes or instructions or Articles of War, or anything of that nature, that by which members of the Armed Forces are advised of their various rights?" A. "Oh, yes."

The COURT: Well, the question is answered, and the question is not objectionable as leading. Objection overruled.

Mr. BUTCHER: Your Honor, in connection with your Honor's ruling, the question has been asked of this witness previously if he advised Mr. Carignan of his rights, and he stated what he so advised him and this question is di-

rected at the same point as to whether Mr. Carignan was advised of his rights. Now, there is no evidence whatever that these various instructions and classes of instructions and other things referred to in the District Attorney's question were ever brought to the attention of Mr. Carignan.

The COURT: Well, I suppose he will bring that out in a subsequent question. It seems to me it is preliminary, leading up to that very point. Objection is overruled.

Q. Now, do you know what courses, if any, are provided for that purpose

M. K. M.

/ by the Army, Mr. Petersen?

A. Yes, sir. There are several military justice courses in which the men are advised of all their rights that they have in the Army.

Q. And including in those rights, are there rights of men who are charged with crimes?

257 A. Yes, sir. It explains to the men what is absolutely necessary for proof of that crime, what their rights are in making statements, their rights to counsel to be present at the interrogation, and in addition to this, they have the Articles of War, punitive Articles of War, which are read to a man when he enlists in the Army, and they are read to him every six months and entered upon his service record.

Mr. BUTCHER: Now, your Honor, I object against on the ground that if such things exist, that those things are the best evidence, and the fact that this man stated that they exist, that they are brought to the attention of men who enlist in the Army and given to them in various courses by the Judicial Department, is completely incompetent, irrelevant and immaterial, in so far as this defendant is concerned, unless it is shown they were brought to his attention specifically.

The COURT: Well, I presume that is the intention; otherwise the whole examination would be without any point. Objection overruled, at this stage.

Q. Now, have you had occasion, Mr. Petersen, to determine by virtue of the records or otherwise, kept by the Army, as to whether Mr. Carignan has ever been through one of those courses?

A. Harvey L. Carignan completed Military Justice Course B, held by the Headquarters, Headquarters  
258 Company, at Fort Richardson.

Mr. BUTCHER: Now, your Honor, in answer to this question, is the witness testifying as to his own knowledge

or something that he got from a record that someone else produced? We don't know at this point what he is testifying from. If he was present, good enough; if he wasn't, then where did he get it? How does he know that he went through this course?

The COURT: Of course, all that would be proper for your cross examination, but if you want to object to it now, you will have to object in a different form. You will have to object on the ground that it doesn't appear that he is speaking from personal knowledge.

Mr. BUTCHER: I objected on the ground that it was not the best evidence, your Honor. It is my opinion that that is the proper ground.

The COURT: You may examine him further to determine what—

Q. Were you present at any time that Mr. Carignan took any of these courses or present at any time when the Articles of War were read to him?

A. No, that I wasn't.

Q. Then your testimony is based on something other than your own personal knowledge?

A. It is based on entries in the service record.

Mr. BUTCHER: Then, your Honor, I request that all  
259 this examination, in so far as these various instructions and classes of instructions are concerned be stricken from the record, and the jury be instructed to disregard it because it is not the best evidence.

The COURT: Well, it will be stricken unless it is connected up by producing the records themselves.

Q. Have you had occasion to examine the record of Harvey L. Carignan maintained by the Army, Mr. Petersen?

A. Yes, I have.

Q. And in your official capacity as agent of the C. I. D.?

A. Yes, sir.

Q. And do you know whether or not that record reflects any information as to whether Mr. Carignan took this course of which you have just spoken?

A. Yes, it does reflect that.

Mr. BUTCHER: I don't believe that is properly connected, your Honor. I think the records will speak for themselves, and I continue my objection.

The COURT: Well, that may be true. When the Court ruled, however, the Court had in mind that the testimony would stand until the United States Attorney had an op-

portunity to connect it up with other testimony, and then, if it wasn't connected up, it would be stricken. You don't know who keeps those records?

A. Yes, sir, I know who keeps them.

260 The Court: Who keeps them?

A. They are kept at the Personnel Office of Special Troops on the Post. Mr. Scott is in charge of all entries pertaining to military courses and to individuals.

The Court: You don't keep them yourself?

A. No; I have access to them to aid in any investigation.

The Court: The ruling of the Court will have to stand, unless it is connected up with the testimony of some other witness who has custody of the records, the testimony will have to be stricken.

Q. Now, what did Mr. Carignan, on this date in question, Mr. Petersen, relate to you as to his activities on that day, do you recall—as to his activities on the date of July 31?

A. Mr. Carignan stated that he came to town with another man whose name I do not recall at the present time. He was driven in by Murray, P. F. C. Murray, and he got off at the first garage on Fourth Avenue as you come from Fort Richardson, and the intention of the other man with him was to purchase a used car. They couldn't find anything they wanted at that garage and they went down to Tucker & Peterson. Just a moment. This is the story that Carignan told me. They went down to Tucker & Peterson, and they went down there, and the down payment on the car was too much. They came to town and had a few drinks. The other fellow was getting kind of drunk.

261 and Carignan wanted to get rid of him and he made an excuse to get away from him for a while, and he met Glenn Evans. Corporal Evans and Carignan then went back to the Post and changed from O. D. clothes to civilian clothes and came on back to town, and Carignan stated that he met an individual in front of the Federal Bar who grabbed ahold of him and started pummeling him and he thought he was in a fight; however, the fellow eventually stated that he had been in the old outfit with him quite a while ago. They wound up in the Scandinavian Bar, and they were drinking—that is, Glenn Evans and Harvey L. Carignan did. While he was in there Carignan stated this individual who he met in front of the Federal Bar, whose name he didn't know, again accosted him, and in the men's room of the Scandinavian Club he had a fight, in which he cut his hand and got a swollen face, and after



he left the Scandinavian Bar, he went next door to the pawn shop and purchased a nickle-plated revolver, which he returned ten minutes later. Then he said he went to Fourth Avenue and took a cab back to the Post.

Q. Now, did anything come out of his conversation with you relative to the approximate time that he went back to the Post?

A. I believe there was, at the time, but right now I don't recall.

Q. Well, do you recall anything with respect to  
262 how much he paid for this revolver?

A. I believe the sum of \$30.

Mr. COOPER: I believe that is all.

### Cross Examination.

By Mr. BUTCHER:

Q. Mr. Petersen, in your capacity as C. I. D. officer, do you also assume the capacity of legal adviser to the men?

A. As far as their rights are concerned, before questioning any man brought to my attention, he is advised of his rights; yes, sir.

Q. Do you serve in any other legal capacity?

A. Just what do you mean by that question?

Q. Well, in advising men as to their various rights and to advise them when they have problems of any nature?

A. No, that I do not.

Q. Are you a lawyer?

A. No, I am not.

Q. In this particular case, in answer to Mr. Cooper's question you stated, he asked you if you had advised Mr. Carignan of his rights, and you stated at that time that you had informed Mr. Carignan that the police could not compel him to make a statement. Is that correct?

A. That is right.

Q. But, if he had anything on his chest, he ought  
263 to tell you so you could help him out. Is that correct?

A. No, sir. He asked me what he should do and how I could help him, and I told him that I had nothing to go on, and if he wanted my help he had to give me a story of what his activities were. Up until that time he had refused to tell what he had been doing on that day.

Q. In other words, you told him that you could not help him unless he was able to tell you what had happened?

A. No, I didn't say I couldn't help him. I said if he wanted me to help him.

Q. Then, you were in no position to help him unless he told you?

A. I had nothing, not even any knowledge of what his story was, true or not. He didn't tell anything.

Q. Now, when you took him into custody at the Post, in what manner did you—

Mr. COOPER: Now, if the Court please, I don't believe there is any evidence to the effect that he was taken into custody at the Post, not one word of evidence to that effect.

The COURT: I think perhaps that is correct. It is assuming something not in evidence.

Mr. BUTCHER: Well, your Honor, I am sure Mr. Carignan didn't, on his own volition, Mr. Petersen must have gone to him and told him that he was wanted in the city, and at least requested him to accompany him, and as far as  
264 custody, when did he ask Mr. Carignan to come into town with him, and in what manner?

The COURT: Well, you may ask him that question.

Q. Will you answer that question?

A. Will you state the question so I can understand it?

Q. What were the circumstances of your approach to Mr. Carignan and his coming into town with you?

A. Well, I went through the Company Commander, as provided in the Army, and asked if he was available and if he would come in.

Q. Did you ask the Company Commander?

A. To check and see if Carignan would come in. He checked and informed me that they could come, and that they would come. I drove up with the car to Headquarters Company.

Q. Now, just a minute, Mr. Petersen. You didn't do this personally—the Company Commander made the arrangements?

A. Well, if you let me finish, I will get around to it. Mr. Carignan was in the latrine shaving and I came to the door and I asked him if he would come downtown with me. Williams was already in the car and the police wanted to ask both of them some questions.

Q. And what was his response to that suggestion?

A. "I will be done in a few minutes."

Q. And then what happened, following that?

A. He got in the car and came downtown.

265 Q. Did you go back out to the car or did you wait for him inside?

A. I waited for him outside the door of the barracks, on the little porch that they have next to the barracks.

Q. And eventually he came out?

A. That is right.

Q. How long a time elapsed, do you remember?

A. I was there approximately five minutes and when he did come down he didn't have a hat and had to go back and get a hat.

Q. Was he dressed in civilian clothes?

A. He was dressed in Army fatigue clothes.

Q. He proceeded to the automobile with you then?

A. He did.

Q. And came downtown?

A. That is right.

Q. Now, when you went into the Police Department, did you have any conversation with Mr. Carignan in the Police Department?

A. When?

Q. When you first went into the Police Department.

A. I believe I asked Mr. Carignan to wait outside while I went in to speak to the Captain.

Q. Well, your purpose in speaking to the Captain was to inform him that Carignan was there?

266 A. My purpose in speaking to the Captain was to find out what he wanted.

Q. Now, in the trip from the Post, did you have any conversation with Mr. Carignan?

A. I think it was relative to another case I was investigating out at the Post; yes.

Q. You didn't have any conversation with him in connection with this case, the Showalter case?

A. No.

Q. At that time you didn't know anything about the Showalter case?

A. No, I didn't have any idea that Carignan was involved in the Showalter case.

Q. Now, after you spoke to the Captain, what did you do then when Carignan, as you say, was outside?

A. After I spoke to the Captain I brought in John Williams and spoke to him for a while, and I took Williams next door to the Military Police Station, made arrangements for his transportation back to the base so he would be back in time for chow. I went back to the Police Station and, I believe Carignan was brought some sandwiches over from the jail, so that he could have dinner before the police spoke to him.

Q. How long did you remain there?

A. I remained there all that afternoon.

267 Q. Did you have any further conversation with Mr. Carignan?

A. Yes, I did.

Q. What was the nature of that conversation?

A. We questioned him as to his activities on the night of September 14.

Q. And that is when he told you of those activities?

A. That is right, of the night of September 14, the night of the assault on Mrs. Norton.

Q. Now, at the time you first saw him at the Post, he was shaving, and the only conversation you had with him then was that you invited him to come into town with you, is that correct?

A. I didn't invite him; I asked him.

Q. Well, all right, you asked him. You had no further conversation then?

A. Not that I recall.

Q. And during the trip into town the only conversation you had was relative to another case that occurred on the Post that you were investigating, is that correct?

A. To the best of my knowledge; yes.

Q. When you got to the Police Station you left Carignan outside and you went in and spoke to the Captain?

A. I didn't say outside the Police Station; I left him waiting outside in the anteroom, inside.

Q. And after speaking to the Captain you went out and brought Carignan in where they had this line-up, is that correct?

A. The line-up was held in the anteroom where Carignan was.

Q. And then your subsequent conversation with him was that afternoon when you and the police were questioning him as to what his activities were, is that right?

A. That is right.

Q. Now, when did you advise him that the police couldn't compel him to make any statement?

A. That is going to be objected to. After he had confessed to the assault on Mrs. Norton, when it was signed and I made arrangements, I called the Staff Judge Advocate to find out whether I could get a release to release him to civilian authorities for prosecution. We were awaiting the answer. We starting asking him, because of the similarity of the attack on Mrs. Norton and Mrs. Showalter, if he was involved in that. For quite a while he refused to answer even the most minute detail of what he had been doing on the day of July 31, then he indicated a desire that he



would like to talk to me alone, and I asked Mr. Miller of the Anchorage Police Department and Captain Barkdoll to leave the room. At that time is when I told him no one could make him make a statement.

Q. Now, this was after you had conversed with him and had questioned him—you and the police officers—for some period of time, relative to the Norton case, and asked  
269 him if he knew anything about the Showalter case?

A. That is right.

Q. So that you advised him of his rights after this interrogation had occurred?

A. No; I myself did, but he was advised of his rights before that.

Q. Well, now, what I wanted to know is when you advised him of his rights. Now, you haven't stated that anyone else  
case

advised him of his rights in this particular / . Now, do you know that anyone else did, of your own knowledge? M.

A. On this particular case?

Q. On this particular occasion, when you were in the Police Department.

A. On this particular occasion? My personal knowledge; no—I mean, I was not present when it was done.

Q. Well, then, you don't know whether it was done of your own knowledge, do you?

A. No.

Q. And the only advice you gave him was, after the interrogation had occurred, in the afternoon of the 16th; is that not correct?

A. The only advice I gave him?

Q. Yes.

A. Yes.

The COURT: Well, do you mean that he was advised  
270 generally as to his rights, before?

A. He was advised before the questioning on the assault on Mrs. Norton.

The COURT: By whom?

A. By Captain Barkdoll of the Anchorage City Police and Mr. Miller.

Mr. BUTCHER: Well, now, your Honor, he has testified that he was not present at that time and he doesn't know whether that occurred or not, of his own knowledge. I ask that that answer be stricken.

The COURT: Were you there when he was advised?

A. No, sir. I was making arrangements for Williams to get back to the Post.

The COURT: Well, the answer then will be stricken.

Q. Now, when he finally talked to you and told you of his activities and asked you to check it, did you check it?

A. Yes, I did.

Q. Did you find that what he had told you, was generally true?

A. Well, it was a general story, with several discrepancies in it. I could find no one who saw or heard a fight at the Scandinavian Bar. I could find no one who—he claimed there were two men in the latrine when he got there and washed his cut hand—I could find no one in the barracks that saw Carignan that day with a cut hand.

Q. Did you contact the individuals that he stated  
271 he was with to ascertain that?

A. I contacted the individuals that he was with, and I ascertained that he was with them up to the time of the purchase of the gun; yes.

Q. Then you had no one to question, did you, as to whether a fight occurred or not?

A. I went to the Scandinavian Bar and questioned the bartender and the employees there. They would know about it.

Q. Didn't you say this fight occurred, from the story Carignan told you, in the latrine?

A. Yes. You couldn't miss a man running out of the latrine with a bloody hand and a bruised face.

Q. Well, that is an opinion, of course, you can't substantiate. Did you find the story as to his purchase of the gun and return of the gun to be true?

A. Yes, I did.

Q. Did you find his story as to his activities in drinking with Evans and Murray as true?

A. Murray was not along on the drinking.

Q. Then, with Evans?

A. Yes.

Q. Did you question anyone else as to his activities in connection with the Scandinavian Club and the other bars, as to his drinking?

A. Yes, Joe Rantos, Frank Kellner.

272 Q. And did you find his statements to be true?

A. I wouldn't say they were true; no.

Q. Well, from your checking with these men as to his drinking activities?

A. To his drinking activities—that was true; yes.

Q. That was true. Then the only part that wasn't true, in so far as you were able to ascertain, was the fight, is that correct?

A. No; the clothing that he wore.

Q. You ascertained that the clothing he told you he wore was not the clothing that he had, as the result of conversing, or questioning other men?

A. Questioning witnesses; yes.

Q. But your only knowledge as to whether there was a fight or whether there was not, was the fact that no one saw him, of the people you checked?

A. That is right. He was with Glenn Evans at the time of the fight and Glenn didn't even know anything about it.

Q. Did you, in these conversations, fix any period of time when these various things you have related occurred, such as the purchase of the gun and the drinking?

A. Will you reword that question?

Q. Did you attempt to fix the period of time during the day of the 31st as to when he performed these various acts; for instance, the drinking activities and purchase of  
273 the gun?

A. Well, he started at 1:00 o'clock in the afternoon.

Q. Do you know what time he purchased the gun?

A. It was established at a later date. I didn't check on that, that particular day, because I couldn't get the man in the store, but it was established at a later date that it was approximately 9:00 o'clock.

Q. In the evening?

A. In the evening.

Q. And do you know when the return of the gun occurred? I believe you testified it was ten minutes later?

A. Well, the purchase of the gun was about ten minutes to nine, and the return would probably be about 9:00 o'clock.

Q. Then, I believe you stated Mr. Carignan told you following that transaction he went to the Post?

A. That is right.

Q. So that the time he went to the Post then, as far as you know, was about 9:00 o'clock or slightly thereafter?

A. Correct, sir.

Q. And you were not able to check whether that was true or not?

A. Well, there was a crap game going on in the barracks at the time, and no one saw Carignan come in at that time, and he said he came in with a bloody hand and washed it  
274 off.

Q. Well, now, you stated, I believe, in your examination in chief, that up to the time of the story where he returned to the Post that he didn't tell you anything else?

A. That is right.

Mr. BUTCHER: That is all.

Mr. COOPER: That is all.

(Witness excused.)

T. F. MOORE, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

By Mr. COOPER:

Q. Would you state your name, please?

A. T. F. Moore.

Q. By whom are you employed?

A. City of Anchorage.

Q. In what capacity?

A. Identification Officer.

Q. By the Police Department?

A. Yes, sir.

Q. Did you have occasion to go to the vicinity of Ninth and A Street on the morning of August 1, 1949?

A. Yes, sir.

Q. What did you observe upon arriving there?

A. Well, I believe one of the police cars was already out there, and there was a shoe laying in the road approximately in the middle of the street, and then over in the weeds just a few steps from the edge of the street was the body of a woman.

Q. And did you take photographs while you were there?

A. Yes, sir.

Q. I show you Plaintiff's Exhibit 2 and Plaintiff's Exhibit 1 and ask if you recognize those photographs?

A. Yes, sir, I do.

Q. Are those the photographs that you took yourself, Officer?

A. Yes, sir.

Q. Now, did you have an opportunity to observe this body that was lying there in the grass?

A. Yes, sir.

Q. Did you see the body later on that day, Mr. Moore?

A. Not until approximately 8:00 o'clock that night.

Q. Where did you see it then?

A. At the funeral home.

Q. I will show you this and ask you whether or not you can state that that is the same body that you saw in the weeds on the date in question?

A. Yes, sir, it is.



Mr. COOPER: I offer the picture in evidence.

Q. And was the body in the same condition as you observed it on the morning that you visited the scene?

276 A. Yes, sir.

Mr. BUTCHER: Your Honor, I object to the District Attorney asking questions while I am examining the document. I can't examine the document and listen to him at the same time.

Mr. COOPER: I am sorry.

Mr. BUTCHER: Your Honor, I will object to this on the grounds that no proper foundation has been laid for its introduction. It is a picture taken—the officer hasn't testified that he took it—it is a picture of the body, but there is no possible means of identifying the body, perhaps by the clothes he might identify her, but there has been no testimony whatever as to that these clothes are the same, and the picture itself is completely unrecognizable as far as the identity of a person is concerned. I think the foundation is inadequate.

The COURT: What is the purpose of the offer?

Mr. COOPER: The purpose of the offer, if it please the Court, is to show the nature of the wounds.

The COURT: Objection is overruled. It may be admitted.

WHEREUPON the exhibit was marked Plaintiff's Exhibit No. 8.

Q. Now, showing you Plaintiff's Exhibit 8, Mr. Moore, calling your attention to the face of the woman in the photograph, can you state what that is that appears in the  
277 photograph, the discoloration on the face?

A. It's blood.

Mr. COOPER: If the Court please, may we hand the photograph to the jury?

The COURT: Have you another one there?

Mr. COOPER: Yes, I do, your Honor.

The COURT: Well, I think you should have both of them go in at the same time.

Q. I ask you if you recognize this photograph, Mr. Moore?

A. Yes, sir.

Q. And is that the same body that you saw in the vicinity of Ninth and A Street the morning of August 1, 1949?

A. Yes, sir, it is.

Q. And does the body itself appear to be in the same general condition as it was on that morning?

A. Yes, sir.

Q. And does that appear to be in the same condition as it was at 8:00 o'clock in the evening of the same day at the morgue where you viewed it?

A. Yes, sir.

Mr. COOPER: I offer it in Evidence, your Honor.

Mr. BUTCHER: Your Honor, I object to the introduction of this picture, this photograph, on the grounds that there are photographs already entered and accepted by the Court as exhibits of the body, and that this picture has no  
278 purpose for being introduced in evidence other than to horrify and revolt the jury, and I object to it on that ground, and that it is not necessary. It is cumulative, and for the purpose of horifying the jury.

The COURT: Does that show something else?

Mr. COOPER: It shows the body in a slightly different position, although we won't urge its introduction.

The COURT: Well, is it for the purpose of showing the character of the wound?

Mr. COOPER: Of the wound, your Honor.

The COURT: You mean it shows something in addition to what the one just offered in evidence shows?

Mr. COOPER: Yes, it does, your Honor. It shows a little larger part of the body, for one thing.

The COURT: It may be admitted, then.

Mr. BUTCHER: Your Honor, I ask, in this instance, Mr. Cooper is no medical doctor and the head appears to me to be the same size as in the other photograph, and the body is not in a different position, but the photograph is taken from a different position, and I would like your Honor to examine it and determine whether it does show a greater necessary evidence as to the condition of the body, and of the wound. I think that it does not.

Mr. COOPER: It is a matter for the jury to determine.

The COURT: Yes, if there is a dispute on it, the  
279 jury may determine it. If it merely shows what the other one already shows, it at least is harmless to use, so the objection is overruled.

WHEREUPON the exhibit was marked Plaintiff's Exhibit No. 9.

Q. Officer Moore, do you recall approximately how long you remained at the scene on the morning that you took the pictures?

A. No, sir, I don't.

Mr. COOPER: Your witness.

## Cross Examination.

By Mr. BUTCHER:

Q. Mr. Moore, you state you are Identification Officer?

A. Yes, sir.

Q. And on the morning of the 31st, the 1st of August, when were you first made aware of the incident of the crime?

A. Did you say the 31st or the 1st?

Q. The 1st.

A. The 1st. It was shortly after 6:00 o'clock.

Q. By "shortly", do you mean ten, fifteen or twenty minutes?

A. Yes, sir.

Q. What was your answer?

A. Yes, sir.

Q. And how soon thereafter did you arrive?

280 A. Well, just as quickly as we could go from my house to the Police Station and back out to the scene.

Q. Would you say that you were there by approximately 6:30?

A. Yes, sir, I was.

Q. Did you have your equipment with you at that time?

A. Yes, sir.

Q. Your photographic equipment?

A. Yes, sir.

Q. And did you proceed immediately to take pictures, or did you examine the various evidences of the crime?

A. I guess it was five minutes after I got there I started making pictures.

Q. You did make an examination of this shoe in the street?

A. Yes, I looked at it.

Q. And you stated that you believed there was another car there when you got there?

A. Yes, sir.

Q. You don't know that of your own knowledge, whether there was or not?

A. There was another car there, but I don't know whose it was.

Q. There was another car there?

A. Yes, sir.

Q. Were there other officers there?

A. Yes, sir.

Q. Do you recall who was there?

281 A. There was Mr. Schwartz, Gillette—I believe that is the name—and Wilson, and there were two Wilsons out there, Woodrow and William.

Q. Both officers?

A. Yes, sir. Mr. Hansen.

Q. Did you say then that you commenced the taking of your pictures approximately five minutes after you arrived?

A. Yes, sir.

Q. And about how long were you in the process of taking the pictures?

A. Oh, ten or fifteen minutes—twenty.

Q. Ten or fifteen minutes?

A. Could have been twenty minutes.

Q. Could have been twenty minutes?

A. Yes, sir.

Q. And what did you do after you took the pictures?

A. Well, I stayed out there, I guess, a few minutes, until I believe Miss Walsh come out.

Q. You stayed until Miss Walsh arrived. Did the doctor arrive at that time too?

A. I don't recall.

Q. You don't recall the doctor being there? Do you recall Mr. Stowell being there?

A. Yes, sir.

Q. When did he arrive?

282 A. Shortly after I did.

Q. Shortly after you did. Was he there when you took the pictures?

A. Part of them; yes.

Q. Did he assist you in any way?

A. No, sir.

Q. Did you take a picture of the shoe in the street?

A. Yes, sir. I believe it shows in one of the photographs.

Q. You took that photograph also?

A. Yes, sir.

Q. And you testified that you saw the body next in the undertaking parlors?

A. Yes, sir.

Q. And did you take the pictures that have been introduced—which were shown to you and introduced—in the undertaking parlors?

A. No, sir, I didn't.

Q. Do you know who took those pictures?

A. No, sir.



Q. Were the pictures you took later delivered to someone else?

A. I think so. I turned them over to the Captain.

Q. You turned them over to Captain Barkdoll?

A. Yes, sir.

Q. Then you didn't have any more concern with them?

A. No, sir.

283 Q. Did you have any more connection with this case thereafter?

A. No, sir, I believe not.

Mr. BUTCHER: That is all.

Mr. COOPER: That is all.

(Witness excused.).

FRANK J. KELLNER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

#### Direct Examination.

By Mr. COOPER:

Q. Will you state your name, please?

A. Frank J. Kellner.

Q. You are a soldier in the Armed Forces, stationed at Fort Richardson, Corporal?

A. That is right, sir.

Q. Are you acquainted with Harvey L. Carignan?

A. Yes, I am, sir.

Q. Corporal, have you been present at any time when the Articles of War were read and explained to you, in the presence of Harvey L. Carignan?

A. I know I have had them read to me, sir.

Q. Do you recall any time that they were read to you when Mr. Carignan was present?

Mr. BUTCHER: He answered that question, your Honor, by saying they were read to him. The previous question was, have they ever been read to Mr. Carignan, in your presence? And his answer was that "they were read to me". Now he repeats the question. It is repetitious.

The COURT: Objection overruled.

Q. Do you know, Corporal? Do you know whether or not the Articles of War were ever read to you at a time when Mr. Carignan was present?

A. I took no special notice whether he was there at the time.

Q. Now, Corporal, calling your attention to the 31st day of July, 1949, did you see Mr. Carignan on that day?

A. I seen him that night, sir.

Q. That evening?

A. Yes.

Q. Where?

A. Scandinavian Bar.

Q. And do you recall how he was dressed at that time, Corporal?

A. I remember him having a brown hat on and a khaki shirt.

Q. Can you identify this photograph?

A. Yes, I can.

Q. Where was that photograph taken?

A. In the Scandinavian Bar.

Q. At approximately what time, do you know?

A. Somewhere between 8:30 and 9:00 o'clock.

Q. And who was in that picture?

A. Carignan, Glenn Evans, Joe Rantos and myself.

285 Q. And did you obtain one of those pictures after they were taken?

A. I did.

Mr. COOPER: We offer the picture in evidence.

Mr. BUTCHER: No objection.

The COURT: It may be admitted and marked Plaintiff's Exhibit No. 10.

Q. I would like to show you Plaintiff's Exhibit 3, Corporal Kellner, and ask you if you can identify that?

A. That was the hat he had on the night we had the picture taken.

Q. And that was the night of July 31, 1949?

A. Right.

Q. Had you seen Mr. Carignan with that hat on at any previous time?

A. I did once in the barracks.

Q. Do you recall whether or not, Corporal, what type or what kind of pants Mr. Carignan had on that evening?

A. That I didn't remember.

Q. Now, did you remain with him the balance of the evening, Corporal?

A. I did not. I left.

Q. And do you know the approximate time that you left?

A. It was about ten minutes after the picture was taken.

286 Q. And you fixed the time the picture was taken as between 8:30 and 9:00?

A. Somewhere between 8:30 and 9:00.

Q. Now, where did you go after leaving there, Corporal?

A. I went over to the restaurant.

Q. At approximately what time, or did you return to the base that night?

A. I did.

Q. Do you recall the approximate time?

A. I think I was back to the base somewhere between 10:30 and 11:00 o'clock.

Mr. COOPER. That is all.

Cross Examination.

By Mr. BUTCHER:

Q. Mr. Kellner, what was the time that you first met Carignan on the 31st of July?

A. Somewhere between 8:30 and 9:00 o'clock.

Q. In the evening?

A. Right.

Q. And where did you meet him?

A. In the Scandinavian Bar.

Q. Were you doing any drinking in the bar?

A. I am positive we had one drink, and I left immediately after that. We had the picture taken, finished our drink and left.

287 Q. Was Mr. Carignan in there when you went in?

A. Yes, he was.

Q. Was he drinking?

A. Yes, he was.

Q. Do you know how long he had been there?

A. I don't know how long he had been at the Scandinavian Bar; no.

Q. Was anyone with him?

A. A party by the name of Glenn Evans.

Q. And how long after you came into the bar was the picture taken?

A. It was taken almost—very shortly after we got in there.

Q. Do you recall the circumstances under which the picture was taken, why it was taken, for what purpose?

A. Well, the girl just came up and asked us if we wanted to have our picture taken. We generally do have them taken, anyway.

Q. Didn't you say that you took one of the pictures?

A. The girl took the picture.

Q. And then you purchased one of them?

A. That is right.

Q. Didn't you state as soon as the picture was taken you left the Scandinavian Bar?

A. I did leave.

288 Q. Wasn't there a period of time elapsed between the taking of the picture and the reproduction of the photograph?

A. Well, I had to go back and pick up the picture.

Q. Oh, you went back later. Was that the same night?

A. No.

Q. That was another time?

A. That is right.

Q. And when you left the Scandinavian Bar, you are assuming it was somewhere around 9:00 o'clock, is that correct?

A. Somewhere between 8:30 and 9:00 o'clock; right.

Q. And did you leave town then?

A. I did.

Q. You don't know anything else about Mr. Carignan's activities that night?

A. I do not.

Q. Where did you go to eat? Didn't you say you went to a restaurant?

A. Right, Star Cafe.

Q. How long were you there?

A. Oh, I would judge about a half-hour or better.

Q. Then it was after that that you went back to the Post?

A. That is right.

Mr. BUTCHER: That is all. Oh, I am sorry, your Honor, a few more questions.

Q. In connection with this hat, Mr. Kellner, you say that you had seen the hat on one other occasion?

289 A. I did.

Q. Where was that?

A. In the barracks, he was wearing it.

Q. Mr. Carignan was wearing it. How long before this time?

A. How long before that time?

Q. Yes.

A. Oh, I would say it was a few weeks before that.

Q. You identified this hat as the hat that Mr. Carignan had on on this occasion two weeks before and on the night the picture was taken. Now, it is a brown felt hat. Now, do you have any particular reason for identifying the brown felt hat which you can state that you know that this is the hat?

A. The only thing I can definitely say, is I noticed the band on the hat because I happened to be along the night it was taken out of the cab, and it had a felt band on it.



Q. Oh, now, just a moment. You stated that the only time that you had seen this hat was about two weeks before, when Mr. Carignan was wearing it. Now, you had seen the hat on another occasion?

A. Oh, I had seen that hat before, but not on him.

Q. Where had you seen the hat before?

A. In a cab.

Q. In a taxicab?

A. Right.

290 Q. Did someone have it on?

A. Somebody had taken it out of the cab, taken it away from the cabdriver.

Q. Did you see that incident?

A. Right. I got out of the cab—

Q. You saw it taken away from the cabdriver?

A. Right.

Q. Was that you?

A. No. I didn't take it.

Q. But you were present?

A. Right.

Q. Do you know the party that took it from the cabdriver?

A. I do, Sergeant Sylvester.

Q. And what did Mr. Sylvester do with it?

A. Well, he tried to get into the—Fort Starns, and they wouldn't let him in because he had the hat on, and he had it pulled way down over his ears.

Q. Was he in uniform?

A. No.

Q. Was he intoxicated?

A. I guess he was.

Q. They wouldn't let him into the Post?

A. Into the bar.

Q. Into the bar?

A. They left him on the Post.

291 Q. They let him go on the Post with the hat?

A. Right.

Q. Did you see him go on the Post with the hat?

A. I did.

Q. Do you know where he took the hat?

A. In the barracks.

Q. In which barracks?

A. Barracks 474.

Q. Is that your barracks?

A. It was.

Q. Is that Mr. Carignan's barracks?

A. It was.

Q. And what disposition was made of the hat at that time?

A. Well, I don't know what Sylvester did with it at the time he took it in the barracks. I imagine he threw it on his bed, or something.

Q. Then was the next time the time you saw Mr. Cardigan wearing it?

A. Right.

Q. Now, during this course of time had you had a chance to examine the lining of the hat and the band?

A. Definitely not.

Q. Didn't you just testify that the reason you knew that was the hat was that you had seen this band on a previous occasion?

292 A. That is right, the band—I did.

Q. Well, then, you must have looked at the band when it was taken from the cab?

A. I noticed the lining—not the lining, but the band—on the hat, the hatband.

Q. On the outside of the hat?

A. Right.

Q. And what peculiar thing about that band caused you to recall it as different than any other band on any other brown hat?

A. It happened to be a real narrow felt band, exactly the same as the hat was.

Q. A real narrow felt band?

A. Right.

Q. Of the same kind of goods as the hat was made of?

A. That is right.

Q. And that is why you are able to identify this particular hat?

A. That is right.

Q. There is no other way that you can identify it?

A. That is right.

Q. You have never worn the hat yourself?

A. Never worn it myself.

Mr. BRYAN: All right. That is all.

Mr. COOPER: That is all.

293 The COURT: You intend to offer this hat as an exhibit?

Mr. COOPER: It is already in evidence, your Honor.  
(Witness excused.)

JAMES E. MILLER, called as a witness, on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

By Mr. COOPER:

Q. Would you state your name, please?

A. James E. Miller.

Q. And you are a soldier in the Armed Services stationed at Fort Richardson?

A. That is right.

Q. Mr. Miller, do you know Harvey L. Carignan?

A. Yes, sir.

Q. Did he at one time occupy the same barracks that you occupied?

A. Yes, sir.

Q. And were you occupying those same barracks on the 31st day of July, 1949?

A. I believe so.

Q. And now, with reference to that date, had you at any time previous to the 31st day of July, 1949, had any conversation or dealings with Mr. Carignan relative to  
294 some pants, Mr. Miller?

A. Well, he borrowed them around that date some-time.

Q. What kind of pants were they? Is it Corporal Miller?

A. That is right.

Q. What kind of pants were they, Corporal?

A. They were brown pants—they were dyed.

Q. Would you take a look at these pants and tell me whether or not they appear to be the same pants to which you have just testified?

A. They look like them—they are.

Q. Now, Corporal, who had you gotten those pants from?

A. Well, I am sure I bought them from Carignan.

Q. And how did they fit you?

A. Well, they were too long.

Q. Now, after these pants had been borrowed, Corporal, by Mr. Carignan, when did you next see them?

A. Well, I think it was about a week ago—a week later.

Q. About a week after that?

A. Yes.

Q. And where did you see them at that time?

A. They were hanging on the bed.

Q. What was their condition?

A. They were back from the cleaners.

Q. Had you sent them to the cleaners?

A. No.

295 Q. Do you know who had?

A. Well, Carignan must have.

Mr. BUTCHER: Your Honor, unless he knows I don't think he better answer the question. The question was whether Carignan had sent them, and he says "he must have", but that doesn't logically follow.

The COURT: Well, he may explain his answer, or you may examine him further.

Q. Now, Corporal, did you send—when did you next send those pants to the cleaners?

A. I think it was the following month.

Q. About a month later?

A. That is right.

Q. And what was your purpose for sending them that time?

A. Well, one of my buddies borrowed them and wore them, and he gave me the money. He said if I would send them, he would pay for them, and I sent them. While I sent them I had them shortened.

Q. You asked that they shorten them?

A. That is right.

Q. Have they been shortened now, then, as to what they were when you sent them to the cleaners the second time?

A. I believe they have been shortened.

Q. Do you know which cleaners you sent them to, Corporal?

A. Oak Cleaners; I am pretty sure it was Oak Cleaners.

296 Mr. BUTCHER: You mean O. K. or Oak Cleaners?

A. O. K.

Mr. COOPER: I believe that is all.

Cross Examination.

By Mr. BUTCHER:

Q. Where did you say you got the pants, Corporal?

A. Carignan.

Q. You originally got them from Carignan?

A. That is right.

Q. You borrowed them from Carignan?

A. No; I bought them.

Q. Oh, you bought them from Carignan, and then you re-delivered them to Carignan later on? Did you ever give them back to Carignan?

A. No; I let him borrow them.



Q. Then you did let him have them on one occasion?

A. That is right.

Q. And you recall that occasion to be about the 31st of July, is that correct?

A. Yes.

Q. Did he give you any reason why he wanted the trousers?

A. Just to go to town in.

Q. To go to town with?

A. Yes.

297 Q. Was it the practice of the men in the barracks to use these particular trousers for that purpose?

A. Well, most of us have civilian clothes and everybody borrows each other's.

Q. Had you lent them to anybody else around that period of time?

A. I don't believe so.

Q. You had lent them on other occasions, however?

A. Yes, I guess so. They had been lent on before.

Q. What fixes it in your mind that you lent them to Carignan about the 31st of July, that day?

A. Well, I remember he called up the shop and asked me if he could borrow them.

Q. He called up the shop?

A. Yes.

Q. Where you were employed?

A. That is right.

Q. And what causes you to fix that as close or on the 31st day of July?

A. I couldn't say.

Q. Do you remember the dates when you lent them to other parties?

A. No.

Q. Do you remember the date that they were returned to you from the cleaners after you think Mr. Carignan might have had them?

298 A. It was about a week after that. I couldn't tell you what date.

Q. Is it the practice of the men, when they wear your trousers, that they clean them before they return them?

A. Well, some do and some don't.

Q. They have been cleaned for you before and since, by other borrowers?

A. I couldn't say that.

Q. Well, they were cleaned in the instance of the soldier that you mentioned you loaned them to last?

The COURT: Well, I think that what others do is immaterial, so far as cleaning them is concerned; the question would be what the custom or the practice of the defendant was in that respect. If you want to show that, why you can show it, but what somebody else did would not have any probative value here.

Mr. BUTCHER: Well, I only wanted to show, your Honor—which I think I have already done—that he doesn't know whom he lent them to except Carignan.

Q. The last time they were returned they were shortened?

A. Well, they weren't returned to me.

Q. They what?

A. They weren't returned to me. They were picked up before that.

299 Q. Had you requested they be shortened?

A. Yes.

Q. And that was for the purpose of making them to fit you?

A. That is right.

Mr. BUTCHER: That is all.

#### Redirect Examination.

By Mr. COOPER:

Q. When are the paydays of the Army, Corporal?

A. Usually the last day of the month.

Q. And if it was the 31st of July, do you recall what day of the week that was on?

A. It was the only time we were ever paid on a Sunday. I think that was the month.

Q. Now, calling your attention to that date, then, is there anything in connection with that that would prompt you to remember when Carignan borrowed these pants from you?

A. Gee, I don't think so, unless that I had to work that night or something.

Mr. COOPER: I believe that is all.

The COURT: Well, did the defendant tell you the length of time that he wanted to borrow your trousers?

A. No. They usually borrowed them one night and would bring them back the next night.

The COURT: Well, had he borrowed them on previous occasions?

300 A. I couldn't say for sure.

Q. If they had been borrowed, it would be without your knowledge, is that right?

A. Yes, that is right.

Q. Were the boys out there in the habit of using each other's clothes?

A. That is right.

Mr. COOPER: That is all.

Mr. BUTCHER: That is all.

(Witness excused.)

WHEREUPON Court recessed for ten minutes, reconvening as per recess with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:

The COURT: You may call your next witness.

Mr. COOPER: If the Court please, I neglected to do something while the witness was in the chair, and I would like to ask if counsel has any objection if we offer these pants in evidence at this time?

Mr. BUTCHER: I don't think it is necessary to call the witness back. I object to it because they have no relative or probative value, and there is no attempt made with this witness to show that Mr. Carignan had those trousers on on the 31st day of July. That is the only reason I object.

301 Mr. COOPER: I would like to offer them for the purpose of identification, at least, your Honor.

The COURT: The objection is overruled. It is not necessary to have a witness on the stand to offer them in evidence.

WHEREUPON the exhibit was admitted and marked Plaintiff's Exhibit No. 11.

WALLACE E. MARTENS, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

By Mr. COOPER:

Q. Will you state your name, please?

A. Wallace E. Martens.

Q. And Mr. Martens, what is your business or occupation?

A. Dry cleaner.

Q. What company?

A. O. K. Cleaners.

Q. Are you the proprietor?

A. Yes, sir.

Q. As proprietor, are you familiar with the system used

there for identifying articles brought in for cleaning and pressing and other attention?

A. I am, sir.

302 Q. I would like to show you this slip of paper and ask if you can identify it?

A. Yes, sir.

Q. And what is indicated by that slip of paper?

A. Well, on the 9th—

Mr. BUTCHER: Well, your Honor—just a minute. If this question is for the purpose of further identification, then I have no objection. If he is going to question him on the paper itself, I want it shown to us so we know what he is being questioned about.

Q. Let me ask you first, Mr. Martens, if you recognize that slip of paper?

A. Yes, sir.

Q. What is it?

A. Well, it is a copy of the bill that we keep on hand, is what it is, of dry cleaning that has been done and sent back out.

Mr. COOPER: We offer it in evidence.

Mr. BUTCHER: We object to this, your Honor, on the grounds that no proper foundation has been laid for its entry. There is no identification as to handwriting or whether an employee has made the notations or whether the witness did it himself, and all we have is a slip of pink paper with the name O. K. Cleaners on it, and I think the identification is insufficient for admission at this time.

303 The Court: Well, it is not necessary to have the person who did the actual writing any more, that is not the rule any more. Objection overruled.

WHEREUPON the exhibit was admitted and marked Plaintiff's Exhibit No. 12.

Q. May I ask, Mr. Martens, with reference to these invoices or slips, what is your practice as to dating?

A. Well, in lots of cases, especially on the Post, the driver brings the cleaning in or picks it up in the evening and it is not checked in until next day. If it is billed on the 23rd, it most likely was picked up on the 22nd.

Q. Now, I show you Plaintiff's Exhibit 12 and ask you to explain what that indicates.

A. Well, it indicates that on the 9th month, the 23rd day, 1949, my driver—by the name of Marcel—picked up from a man by the name of Miller, picked up at "474 Up", meaning upstairs, one O. D. jacket and two trousers, one O. D.



and one brown, and the brown trousers were to be shortened to 29 inches inseam.

Q. Now, I show you Plaintiff's Exhibit 11 and ask if there is anything about that by which you can identify it?

A. Yes, it has our regular marking tag on it; and the number corresponds with our ticket, and it also has the alteration tag on it which we always use—the white tag.

Q. Now, I show you another slip of paper and ask if you can identify this?

304 A. Yes, this is another one of our bills, but picked up from Carignan at the time.

Q. Before testifying to that, is that one of the slips you keep in the ordinary course of business?

A. Yes, one that we always keep on file.

Mr. COOPER: We offer that in evidence.

Mr. BUTCHER: Your Honor, we object to this on the same grounds that we objected to the other slip of paper. I don't think it is necessary to state the grounds again.

The COURT: The same ruling.

Mr. BUTCHER: Your Honor, I think it would be less confusing to all of us if the District Attorney would introduce his evidence in chronological order so we could follow it. This slip of paper being the first transaction, the one directly being attempted to be connected with Carignan, and the other piece of paper having no probative value as far as Carignan is concerned, to be introduced later then.

Mr. COOPER: If it is satisfactory to the defense, your Honor, I prefer to handle the case this way.

The COURT: The order of introducing proof is with the United States Attorney and with the discretion of the Court, and if he does not follow a chronological order, it is because of some reason, and the reason appears quite clear why he offered the other one first.

WHEREUPON the exhibit was admitted and marked 305 Plaintiff's Exhibit No. 13.

Q. Now, I show you Plaintiff's Exhibit No. 13, Mr. Martens, and ask if you will explain that.

A. On the eight month, the second day, 1949, a driver by the name of Marcel Boblin picked up from a man by the name of Carignan, barracks "474 down", in this particular case, one pair of brown trousers, and they were picked up on the 1st and marked in on the 2nd, and he wanted them back or we were supposed to deliver them back on a Wednesday.

Q. Now, when you say "picked up on the 1st"—the 1st of what month?

A. The eight month, the first day.

Q. You mean the 1st of August then?

A. Yes.

Q. Now, Mr. Martens, when did you last see this pair of trousers?

A. This pair of trousers?

Q. I refer to Plaintiff's Exhibit No. 11. Do you recall approximately when you last saw them?

A. Well, the last time I saw them was in your office when I was called as a witness or subpoenaed.

Q. Let me put the question this way: did you—was delivery made by you people to Miller, of these trousers?

A. No, sir. Those trousers were picked up by the United States Marshal at our office.

306 Mr. COOPER: Your witness.

### Cross Examination.

By Mr. WEIR:

Q. Mr. Martens, I believe you testified that the pants—have your identification marks in them?

A. Yes, sir.

Q. Now, does the slip, the pink slip of paper, that you—I imagine it is in the form of a receipt for the pants?

A. That is not the form of receipt. That is what we keep on file.

Q. That pink slip of paper, does that have any mark of any description which corresponds to the mark on the pants?

A. Definitely.

Q. They are identical?

A. Yes.

Q. Mr. Martens, with relation to these pants, to which that one pink paper applies with the name of Carignan on it, do you know Mr. Carignan or not?

A. I have never seen the man in my life.

Q. Have you ever seen him wear those pants?

A. I can't say I have, because I don't know the man.

Q. How do you account for the fact that the name Carignan is on the ticket?

307 A. The ticket that corresponds with the pants does not say Carignan on the ticket; it says Miller on the ticket.

Q. I am sorry, I thought one of them said Carignan.

A. One ticket does say Carignan, and we picked up one pair of pants from Carignan, definitely.

Q. You have nothing to do with the pickup?

A. No, my drivers do that.

Q. On the ticket which has Mr. Carignan's name on it, is there anything on that ticket that identifies that pair of pants?

A. That pair of pants? No, there isn't.

Q. In other words—

A. Just a second—could I see that Carignan slip again, please, before I make that statement? No, there isn't anything on this Carignan ticket that corresponds with that pair of trousers, other than the fact that they are brown and from conversation with my office girls, the same pair, those G. I. pants dyed brown, which are the same trousers that were in there before, for Carignan.

Q. But do you not have the handling of other trousers—is that the only pair of brown trousers ever taken from the Fort?

A. Oh, no, we have lots of them.

Q. Isn't it quite possible that ticket for Carignan does not correspond with these pants? It is an assumption on your part.

308 A. Myself, personally, well, yes, definitely. I mean, I can't say those are Carignan's pants, because this number doesn't correspond with the trousers; no.

Mr. BUTCHER: No further questions.

Mr. COOPER: That is all.

(Witness excused.)

PAUL HERRING, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

By Mr. COOPER:

Q. Would you state your name, please?

A. Paul Herring.

Q. You are the United States Marshal for the Third Division, Territory of Alaska?

A. Yes, sir.

Q. Did you engage in the investigation of the death of one Laura Showalter?

A. Yes, sir, I did.

Q. In connection with that investigation, did there come into your possession various articles of wearing apparel?

A. Yes, sir.

Q. From whom did you receive those articles, Mr. Herring?

A. I received them from the police, most of them from Mr. Barkdoll.

309 Q. I would like to show you Plaintiff's Exhibit 3 and ask if you recognize it?

A. Yes, sir.

Q. And is there anything about that particular hat that you can definitely identify as the hat that was turned over to you by the police?

A. Yes, sir, there are two things about it. One is the number in the crown here, and the initials H. A. B., 1066, and the other is a small pinhole in the band of the hat.

Q. Has that hat been in your possession from the time it was turned over to you by the police?

A. Yes, sir, until I turned it over to you.

Q. In connection with your investigation of this case, did a number of people handle that hat?

A. Yes, sir, there has been a great many people have handled it.

Q. I will ask you, at the time it came into your possession, whether or not the condition of the lining was the same as it appears now?

A. At the time it came into my possession, the lining was about three-quarters sewed to the hat by this thread that still remains with the lining, and about one-quarter of it, roughly speaking, one-quarter to a third of it, the thread had come loose in it.

310 Q. Now, Mr. Herring, during your investigation, have you obtained any other hats containing that same marking?

A. Yes, there are two other hats, although I personally did not pick them up.

Q. Do you know who had them?

A. Benny Rumsauer.

Q. Do you know his business or occupation?

A. No, I don't except that I have been told that he was a cabdriver.

Q. Now, Mr. Herring, did you ever have any conversation with the defendant Carignan relative to the death of Mrs. Showalter?

A. Yes, sir.

Q. And did he at any time make any statement to you in writing?

A. Yes, sir, he did.



Q. Do you remember the approximate date that statement was made?

A. The statement was given to me on the 19th of September.

Q. Now, what were the circumstances under which the statement was written out, Mr. Herring?

A. The circumstances under which the statement was written out were, I believe, on the 17th of September, I talked with Mr. Carignan in an endeavor to get a statement from him, and he asked to see a priest, and the priest was gone for him and after some—probably an hour with the priest, I again talked with Mr. Carignan and asked

311 him if he cared to make a statement to me, and he said "Yes". At that time I gave him a pad of yellow paper and two indelible pencils, made arrangements with Mr. Stowell and Mr. Barkdoll to place him in a cell by himself in the City Jail, as Mr. Carignan had expressed the desire to be by himself, and strict orders were given that no one was to disturb Mr. Carignan in any way during the period from Saturday, September 17 until Monday, the 19th. He was not to be asked any questions or no one was to go in the cell, except to take his meals, and that the statement that he was writing on, if he wrote such a statement, he was to have the privilege of putting in his pocket and taking with him to meals, and that no one was to touch that statement under any circumstances, and at the time that Mr. Carignan was put into the cell he was informed by me that after he had written the statement, if he did not care to give it to me he could tear it up and flush it down the toilet. That was on Saturday, and on Monday, again Monday morning, I went over, got Mr. Carignan, brought him over and at that time I asked him if he had prepared a statement and he said "Yes, ~~in~~" and I asked him if he would care to give it to me, and he said "I would like to see the priest first", so the priest was called in again and spent some—I don't know, I didn't keep a record of the time—but I would judge the time to be between an

312 hour and an hour and a half, alone with Mr. Carignan. After he left, I went into the room and asked him if he cared to give me the statement at that time, and he said "Yes, sir, but there is nothing in it". He gave me the statement, and the statement at that time carried him through until the time he left a bar at about 9:00 or 9:15 p. m., somewhere—I don't remember the exact time—and after that I again talked with Mr. Carignan and he told

me he was afraid to put the rest of it down for fear that he wouldn't be believed, and for fear that his neck would stretch, but after some conversation—and Mr. Barkdoll was there, I believe, and suggested to Mr. Carignan that perhaps he would rather talk to me alone, which Carignan at that time said he would, and Mr. Barkdoll and Mr. Miller, I believe it was, left the room, and after some five or ten minutes, Mr. Carignan agreed to write down the rest of the story.

Q. Then did he finally hand you that statement, Marshal Herring?

A. Yes, sir. When he handed it to me I told him at that time he could still destroy it if he wished.

Q. Now, at any time during your conversation with Mr. Carignan relevant to this statement, were any promises made to him?

A. No, sir, no promises were made to him. He several times mentioned the fact that he was afraid that his neck would stretch, and I had to tell him that there were no promises I could make him.

313 Q. Well, was anything said to him in the nature of a threat?

A. No, sir, he was never threatened. As a matter of fact, he was treated with the utmost courtesy at all times, as if a guest in my own home. That was something that was stressed right from the very beginning, and at no time was there to be any violence or threatening language used against the man. We went out of our way to be courteous to him at all times, and furthermore, we went out of our way to see that he had everything that he wanted for his comfort. He had cigarettes, water if he wanted it, and I think on one occasion he was even offered a cushion on the chair if he needed it.

Q. I would like to show you this, Mr. Herring, and ask if you can identify it?

A. Yes, sir.

Q. Is that the statement that was handed to you by Mr. Carignan on the 19th, to which you have just testified?

A. Yes, sir, that is the statement.

Q. In whose handwriting is that statement?

A. In Mr. Carignan's handwriting.

Mr. COOPER: We offer the statement in evidence.

Mr. BUTCHER: Your Honor, there seems to be a paper attached here which is not part of the statement, which, from reading it, has no bearing whatever upon the statement. It appears to be some anonymous quotations,

314 too, and a quotation from Woodrow Wilson regarding unselfishness and courage, and consideration, and that the road to a man's heart is through his stomach. It is not included among the numbered pages that the purported statement includes, and I don't know whether the District Attorney intends to introduce it as part of the statement or not. I would like to know at this time.

Mr. COOPER: We have no objection to its going in.

Q. It is my understanding, Mr. Herring, all these papers were handed to you at the same time?

A. That last one, I can't recall whether that was handed to me at this time or with another statement that was given me later.

Mr. COOPER: Then we don't offer the last page at this time, your Honor.

Mr. BUTCHER: Now, your Honor, I would like to examine Mr. Herring on the faking of this statement.

The COURT: You may do so.

Questions by Mr. BUTCHER:

Q. Mr. Herring, in the statement you have just made in answer to the District Attorney's questions you have told all that you know about this matter in as far as your connection with Mr. Carignan is concerned; is that correct?

A. You say, all that I know?

Q. All that you did in relation to Mr. Carignan during this period?

315 A. No; there may be other things that have slipped my mind. I would be glad to be informed of them if there are, and I would be glad to answer them.

Q. When did you first hear about this case?

A. About the case? I first heard of it on the morning of August 1st.

Q. What time was that?

A. When I came to work, which was at 8:00 o'clock.

Q. At 8:00 o'clock?

A. Yes, sir.

Mr. COOPER: If the Court please, we are not through with our direct examination of Mr. Herring yet. My understanding is that counsel is going to ascertain whether or not this confession is admissible and I think his questions should be directed to that point.

The COURT: Yes, the preliminary examination to determine the admissibility of this would have to be rather limited in scope, or it should be limited to the circumstances under which it was obtained.

Mr. BUTCHER: Your Honor, my only purpose in examining Mr. Herring is as to the admissibility of this document, and all of the facts leading up to the taking of the statement wherever Mr. Herring had any contact with Mr. Carignan, if there was in that contact something done or said toward the taking of this statement, then that is  
316: relevant to the admissibility.

The COURT: You may begin then from the time when he first met the defendant.

Q. When did you first meet Mr. Carignan?

A. September 17th.

Q. And under what circumstances, Mr. Herring?

A. The circumstances were that Mr. Barkdoll came to my room in the hotel Saturday morning, September 17th, and told me they had picked up a man that night for slugging a woman and that the crime seemed to him to be very similar—

Q. Mr. Herring, which night was this Saturday night?

A. This was Saturday morning that Mr. Barkdoll spoke to me, and that would have made it, I believe, Friday night.

Q. He told you that he had picked up a man?

A. That they had a man over at the City Jail they picked up. He may have been picked up Thursday night. My impression is that he was picked up the night previous, on Friday night, and holding him for the slugging of a woman and that the two crimes seemed to be very similar, and later on that day I went to the City Police Station and talked with Mr. Parkdoll and Mr. Stowell, and the upshot of that was that I—

Q. Have you any idea, Mr. Herring, what time of the day that conversation was?

A. Well, sir, I believe that it was right around  
317: noon. I would say it was around noon, I believe.

Q. The time that you had the conversation with Mr. Barkdoll was the first thing Saturday morning; is that correct?

A. No; it wasn't the first thing Saturday morning. I would say it was probably 10:00 or 10:30 Saturday morning, somewhere in that neighborhood, and about noon I dropped by the Police Station, and after talking with Mr. Barkdoll and Mr. Stowell it was decided I would question him in an endeavor to get a statement from him as to whether or not he had anything to do with the Showalter case.

Q. Did they tell you at this time that they had tried to get a statement from him?



A. I don't believe they had, not to my recollection. They said it looked awful good.

Q. What do you assume they meant by "looking awful good"?

A. Well, by that I could assume and probably did assume at the time that he had been talked to.

Q. That he had been talking?

A. Yes, sir.

Q. And they requested you to question him; is that correct?

A. I believe it was suggested by Mr. Barkdoll that I question him.

Q. Was it their belief that you could get more out of him than they had been able to get?

A. That I don't know, sir.

318 Q. Did you in fact question him on that occasion?

A. Yes, sir.

Q. What time of the day was that?

A. I believe that it was early in the afternoon Saturday. If I remember right, I took Mr. Carignan over to the Anchorage Grill and bought him a dinner so that he wouldn't suffer any pangs of hunger while he was being questioned.

Q. You did this?

A. Yes, sir; out of my own pocket.

Q. Were you accompanied by anyone else besides Mr. Carignan?

A. Yes; there was another officer. I believe it was Mr. Miller; I am not positive on that. And then we came over to this building, and I questioned Mr. Carignan and warned him of his rights.

Q. You what?

A. He was warned of his rights, and then I questioned him.

Q. In what manner did you warn him of his rights? What did you tell him?

A. I told him he did not have to make a statement at this time, that anything he said could be used against him, and that he was entitled to counsel if he so desired.

Q. Did he discuss with you the question of getting counsel at that time?

A. No, sir, he did not.

319 Q. Did you ever discuss with him the question of getting counsel?

A. No, sir.

Q. You may proceed and tell what happened in the rest of the interview?

A. The rest of the interview is as I have told Mr. Cooper here.

Q. How long was he in your office on this occasion, (Mr. Herring?

A. Possibly for an hour and a half or so, maybe two hours. But at any rate he expressed a desire to see a priest.

Q. Did he make any kind of statement to you as you were questioning him?

A. Yes, sir. He gave me a statement verbally; not in writing; verbally; yes.

Q. Did he make any statement which supported the statement that you have here in writing? Did he confess?

A. Up to a certain point. No, he didn't at that—at that time he didn't confess, but he as much as told me; at that time he expressed a fear of his neck stretching if he did tell me.

Q. Did you discuss the question of his neck stretching with him?

A. Naturally. I told him—

Q. Did you tell him what might happen to him?

A. I told him it was something I couldn't tell him, 320 promise him, one way or the other as to what was going to happen to his neck, that it was entirely a matter for the jury.

Q. Well, what other conversation, what other discussion occurred during the two hours he was in there, apart from his request for a priest?

A. We had a discussion as to his background. I was very interested in what had prompted him to commit such a crime as this, if he did commit it, at that time.

Q. So you went into his background?

A. Yes, sir.

Q. Did he give you any information about that background?

A. Yes, sir, he did.

Q. Now, during the time he was in there did he refuse to make a statement in connection with this crime to you?

A. I can't recall that he ever refused to make a statement; no, sir. He told me that he wanted to see the priest first.

Q. Well, did he promise you that he would make a statement?

A. After he saw the priest; yes.

Q. Did he promise you that he would make a statement confessing to the crime?

A. He promised that he would make a statement telling me all that he knew about it; yes, sir.

Q. All that he knew about it?

A. Yes, sir; as to what he had done that day.

321 Q. About what time of day was he released from your office on this Saturday afternoon?

A. I would say off hand; Mr. Butcher, and it is only a guess, that it was probably in the neighborhood of 4:00, 4:30, in the afternoon. I had quite a time finding the priest. I had to walk over to the hospital and then to the church, and then it must have taken me an hour or an hour and a half before we finally found the priest.

Q. Where did Mr. Carignan stay while you were looking for the priest?

A. He was returned to the City Jail.

Q. And did you then take the priest to the jail?

A. We took him over there and then—the priest came to the jail—and then the whole party came over here, and we used the grand jury room.

Q. What time of the day was that?

A. It was in the afternoon. It was, as I say, probably around 3:00 o'clock. I don't remember exactly.

Q. Didn't this conversation you had with him in your office take two hours? Didn't you state that it took about two hours in which he told you the story of his life?

A. I said that it took probably an hour and a half and maybe two hours; yes, sir.

Q. And he was released somewhere around 4:30 or 4:45—didn't you say that—and take him back to the jail?

322 A. No, sir, I did not say that. I said at the end of that time he was taken back to the jail and I went looking for the priest.

Q. It took you approximately an hour and a half to go look for the priest?

A. And it took me an hour or an hour and a quarter, somewhere in that neighborhood, to find him. I have told you that I do not recollect the exact number of minutes or hours in this thing. I may be off an hour or so.

Q. Then after you found the priest you all gathered back in the grand jury room?

A. Mr. Carignan and the priest went in the grand jury room; yes, sir. They were left alone.

Q. Were you present near the vicinity of the grand jury room so that you knew how long they were in there?

A. Yes, sir. I was waiting outside in the hall.

Q. How long did they stay in there?

A. They stayed in there probably an hour or maybe more.

Q. Now, what time would that have placed the day, Mr. Herring?

A. I told you, Mr. Butcher, probably about 4:00 or 4:30.

Q. After he had stayed in there an hour and a half with the priest?

A. Yes, sir.

Q. After you had spent an hour and a half looking for the priest and after you had had this discussion with him  
323 in which he told you the history of his life, it was still only 4:30; is that what you are saying?

A. That is four and a half hours, isn't it? That is about right; yes.

Q. Now, when they came out of the grand jury room, what happened then?

A. When he came out of the grand jury room, I asked him if he wanted to make a statement. He said, "Yes. If you will give me a pencil and paper, I will make a statement." And I gave him a yellow tablet with two indelible pencils, took him back to the City Jail, and he was put in the women's jail. The women in the jail were transferred to the Federal Jail so that he could be alone by himself without being disturbed.

Q. Could you give us some idea as to what time you took him back to the jail with the pencil and paper?

A. Probably within fifteen or twenty minutes after the priest left.

Q. That would place the time somewhere about five o'clock?

A. Somewhere in that neighborhood. I don't recall the exact time.

Q. And then you saw him placed in the jail, in the cell, with the pencil and paper; now, is that correct?

A. No, sir; I didn't see him placed in the cell with the pencil and paper. Mr. Barkdoll gave orders at my  
324 suggestion that he be not disturbed in the cell with the pencil and paper. I did see him in the cell afterwards with the pencil and paper.

Q. How long afterwards?

A. I believe the next day, on Sunday, I dropped by the jail to see how he was getting along.

Q. You didn't bother him any more on Saturday?

A. No, sir, I didn't bother him any more; I didn't bother him any more at any time until Monday morning.



Q. Well, you say you went in there on Sunday?

A. Sunday; to see how he was getting along, to see if he needed any cigarettes.

Q. Did you talk to him on that occasion?

A. I believe I went to the door and asked him how he was getting along.

Q. Do you recall what he said?

A. "All right"; or words to that effect.

Q. Did you bring him any cigarettes or anything else?

A. No, sir.

Q. Did you take him out to lunch?

A. No, sir, I don't believe I did that day.

Q. And then you didn't see him any more on that day; that was Sunday?

A. Yes; that is right.

Q. When did you see him next?

325 A. I saw him Monday morning.

Q. And was that over at the jail or in your office?

A. Both. He was brought over to my office; I brought him over here.

Q. You brought him over here?

A. Yes, sir.

Q. What was the purpose in bringing him over?

A. The purpose in bringing him over was to see if he had finished his statement and wished to give it to me.

Q. Did you discuss the statement with him over at the jail before you brought him over?

A. No, sir; I did not.

Q. You just requested he come with you?

A. Yes; that is right.

Q. And you brought him to your office?

A. We went up to the grand jury room.

Q. Just you and he?

A. No. He and I and Mr. Miller, I believe, of the City detectives, and Mr. Barkdoll.

Q. And did you all go in the grand jury room with him?

A. Yes, sir.

Q. And what was the statement he made there or request he made upon you?

A. The request he made upon me?

Q. Did he make any request upon you?

326 A. Not that I can recall. If you know of any you wish to remind me of it, I will answer it.

Q. Didn't you testify he made a request to see the priest again.

A. Not right at that time; no, sir.

Q. Well, what happened?

A. It was a little later than that.

Q. What happened, if you know, before he made the request to see the priest in the grand jury room?

A. I asked him if he had a statement he wishes to give to me. He said, yes, he had a statement. And I asked him if he wished to give it to me at that time, and he said, "No. I wish to see the priest."

Q. And then you procured the priest again, did you?

A. Yes.

Q. This was Monday, you say?

A. That was Monday.

Q. Do you recall the date?

A. The 19th.

Q. Monday, the 19th?

A. September 19th; yes, sir.

Q. And after the priest came, how long a period went by before the priest left?

A. Well, that was another long period. It was, I would say, over an hour.

327 Q. This was in the forenoon of Monday?

A. Around, yes, sir, somewhere, I would say, between eleven and twelve o'clock; I am not positive of the time.

Q. And after the priest left did you have further conversation with him?

A. Yes, sir.

Q. About the statement?

A. Yes, sir.

Q. And what was the nature of that conversation?

A. At that time he didn't want to talk, and Mr. Barkdoll suggested that maybe he would rather talk to me alone, and he said that he would. Mr. Barkdoll and Mr. Miller left the room.

Q. While Mr. Barkdoll was talking to him, was Mr. Barkdoll trying to get a statement from him too?

A. No, sir.

Q. What was Mr. Barkdoll talking to him about?

A. The only words he uttered, as far as I can remember, was, "Maybe you would rather talk to Mr. Herring alone." Naturally he was there as a police officer to assist in getting a statement. I don't recall him having asked Carignan any questions, though.

Q. Did Miller participate in any of the discussion?

A. He may have. I don't remember him having asked him anything.

328 Q. Did Mr. Miller state to him in your presence that you were a pretty big man around here and would be able to help him if he would give you the statement?

A. That I don't recall. It is possible though he may have said that, Mr. Butcher. I wouldn't deny it, and I wouldn't say he did, but I wouldn't deny it.

Q. Did you at that time tell Mr. Carignan that there had not been a hanging in Anchorage for twenty-seven years?

A. I told you Mr. Carignan expressed several times a fear that his neck would stretch, and I told him that I could not promise him anything, and I told him in the time I had been in this division for twenty-seven years that there had been no hanging, what would happen to him I couldn't promise him or anyone else.

Q. Did you tell him that if he cooperated with you that you would do the best you could to get his sentence reduced to manslaughter?

A. No, sir, I did not.

Q. Did you tell him that if he didn't cooperate with you that his neck would stretch?

A. No, sir, I did not.

Q. But you think it possible that Mr. Miller might have told him that you could be of some influence in helping him?

A. It is possible that he may have told him that; yes, sir; but I did not tell him that.

329 Q. Now, Mr. Herring, do you have in your office some religious plaques which are on the wall?

A. Yes, sir, I do.

Q. They are pictures of the Lord and various other of the saints in the time of Christ?

A. Yes, sir.

Q. Did you ever have any discussion with Mr. Carignan about those plaques?

A. Yes, sir. I asked him what he thought his Maker would think about him.

Q. Did you tell him to look in the eyes of his Maker as he stood looking at the plaque and then tell you the truth?

A. I don't recollect those exact words; no.

Q. Did you tell him to look in the eyes of his Maker?

A. I believe at one time I asked him if he knew who this portrait was on the wall—would be words to that effect; yes.

Q. And if he wondered what his Maker would think of him for doing this?

A. Yes, sir.

Q. And did you suggest to him that his Maker might think more of him if he told the truth about this?

A. I may have.

Q. Well, did you or did you not?

A. I believe I did.

330 Q. You believe you did?

A. Yes, sir.

Q. Did you have considerable other discussion with him about these religious plaques?

A. Not that I recollect; no, sir.

Q. Did you tell him you understood the trouble he had when he was a boy because you had had similar troubles?

A. Yes, sir. Our lives were very similar.

Q. And you were able to work your life for the better because you told the truth?

A. I don't remember that I attributed it to telling the truth; no, sir; but our lives were very similar nearly from the very moment I was born.

Q. Did you discuss with him the value of truth at that time and the effect it would have upon his character?

A. I don't specifically remember that. I may have, though.

Q. Did you discuss with him the prison at McNeil Island?

A. I don't believe I did.

Q. Did you tell him that you occasionally took groups of prisoners to McNeil Island?

A. I may have.

Q. Did you tell him that you were well known by the authorities at McNeil Island?

A. No, sir.

Q. Did you tell him that you might be able to be of  
331 benefit to him, if he went to McNeil Island, in getting him a responsible place down there?

A. No, sir, I did not. I believe I do recollect some talk about McNeil, now that you mention it, and he asked me what kind of a place it was, and I told him that I had known men that had been there and learned a trade and that made something of their lives, and if may be that I told him of one specific instance of a man that learned a boat-building trade there.

Q. Did you say you were in a position to help men who went there?

A. No, sir, I did not.



Q. Now, Mr. Herring; going back for just a moment, have you had occasion to know of your own knowledge the day that Mr. Carignan was arrested?

A. No, sir.

Q. And brought to the Police Department?

A. No, sir.

Q. You don't know it was on the 16th?

A. No, sir.

Q. Do you know of your own knowledge when he was brought before the magistrate?

A. He was brought before the magistrate, I believe, on the 16th, the afternoon or evening of the 16th.

Q. Did you see him on that day?

332. A. No, sir, I did not.

Q. Did you see him on the following morning?

A. On the following morning?

Q. Yes.

A. I saw him on the morning of the 17th, if that was the following morning—on Saturday morning.

Q. If the morning of the 17th turned out to be Friday morning, it would be Friday morning that you saw him—did you not?

A. It was Saturday I saw him. If it turned out to be the 17th, then—it was still Saturday.

Q. Then Sunday would be the 18th—17th—would it not?

A. Sunday would be the 18th if Saturday was the 17th.

Q. And Monday would be the 19th?

A. Yes, sir.

Q. And it was on Monday you obtained the statement?

A. Yes, sir.

Q. So that you had conversations with him on Saturday and on Sunday and on Monday?

A. I had conversations with him on Saturday and on Monday, unless you call it a conversation when I dropped by to see how he was getting along on Sunday for maybe a quarter of a minute.

Q. You did speak to him?

A. And asked how he was getting along, if everything was all right.

333. Mr. BUTCHER: Your Honor, at this time, we would like to have the jury excused, and we would like to call Mr. Carignan to the stand and examine him on the taking of this statement.

The COURT: Well, the motion is denied. I have heard enough evidence on this matter.

Mr. COOPER: We renew our offer.

The COURT: Any objection?

Mr. BUTCHER: We object on the grounds that it was taken from Mr. Carignan as the result of promises and inducements and is not a voluntary statement.

The COURT: Objection overruled. It may be admitted.

WHEREUPON the exhibit was marked Plaintiff's Exhibit No. 14.

Mr. BUTCHER: Your Honor, I would like to take an exception, unless one is taken automatically. My offer is to put Mr. Carignan on the stand to hear the manner in which the statement was made and inducements offered.

The COURT: You may have your exception.

WHEREUPON the direct examination was continued by Mr. Cooper as follows:

Q. Mr. Herring, would you read this statement to the jury?

A. "Anchorage, Alaska, September 19, 1949. I Harvey L. Carignan, hereby make the following statement of my own free will, not being forced to in anyway by any one. I am sitting in a cell by myself.

"On or about 10:30 in the morning of July 31st 1949, Chris Kisel and myself caught a ride to town with Mitchell Murray and Phillip Bond; in Murray's car. We come to town with intentions of buying a second hand car from one of the 'Used Car Lots' in town. Kisel and I got out of Murrays car at the 'Dodge and Plymouth' garage in Anchorage. We looked some cars over and asked one of the mechanics for a salesman. He said there wasn't any salesman around, we said we would be back later. We then crossed over to Fifth Avenue and went to 'Tucker's and Peterson's' garage. We tried out a couple of cars, a 1941 Packard and a 1940 Studebaker Coupé, and they wanted to big a down payment on them so we come down town to eat. We stopped at the Anchorage Grill and eat. I even remember we had veal chops. At about one thirty or two o'clock in the afternoon we went down to the 'White Spot' bar and had a quite a few drinks. I was drinking beer and Whiskey Sours. We remained there until about three thirty and we walked east down Fourth Avenue. When we come to the end of the same block the 'White Spot' is on I told Kisel I'd see him later because I was going to a house. I walked down to Third and back up to Fourth Avenue (around the block) and when I got to the same spot where I left Chris Kisel I met Glenn Evans. We walked directly across the street and drank eight or

335 "ten coke-highs and two beers with Evans. We also met Kisel in there. He was with a friend of his. Glenn and I left Kisel and his friend there"—I guess that is "Evans" or "Glenn"; whatever it is, I can't read this word; anyhow—"I left Kisel and his friend there and went back to where I had met him and we got our shoes shined. From there we went to the 'Village Bar' and had a few drinks. We decided we wanted to go to the 'Scandinavian Club' for a while. On the way down there we met three fellows in front of the 'Federal Bar' and some big fellow just started swinging at me. When his buddies tried to break the fight up he said, 'It's all right. We used to be in the same outfit.' I don't recall ever seeing him before. So that broke up and we went to the 'Scananavian Club'.

was

M. K. M.

We got there and / drinking a quite a bit. Mostly coke-highballs. I met a fellow a fellow," repeated, "I used to know on Adak. This was about eight thirty. About a quarter to nine Frank Kellner and Joe Rentos came in and we had a few more drinks together. At nine o'clock a girl come in and Glenn Evans, Frank Kellner, Joe Rentos, and I had a picture taken. I don't remember who paid for them, but I got one of them. Joe Rentos got the other. Right after that I got pretty friendly with the accordian player. I sang a couple of songs while she played. I don't

know what time it was that night when I was in the  
336 'Hock Shop' next door, but I seen a silver colored pistol I bought for thirty dollars. About ten minutes later I brought it back and he refunded my money. He said he knew I had given him the wrong name and the right Army Serial Number #17172814. After that I went back to the 'Scandinavian Club', and talked a little while with the accordian player again. During this time I bought her a few drinks and drank a quite a few myself. By this time I was pretty drunk, but I do remember straightening some soldiers brass. He had his Artillery buttons on upside down. He was pretty drunk too. I kept on talking to the accordian player and tried to get her to quit her job and go home with me. All of this was just plain drunk talk. I doubt if I'd even recognize her if I seen her now. All this time I was drinking and getting more under the influence of liquor. I went to the lavatory and got in a fight. I hit him and knocked him down and he didn't try to get back up. He had hit me on the right side of my face, because it hurt and was swelled up by the time I reached

the barracks that night. My mind was getting hazy and I started out to get fresh air. I do not remember of talking to or seeing Glenn Evans before I left. I remember of going out of the bar and turning left, and I do not know where I went during this time. The next thing I remember I was walking down the street with a woman and I hit her  
 337 in the nose or the face. I did not know this at the time, but it come back to me later when I was trying to piece together in my mind what had happened that night. The first thing I remembered was me sitting and hitting a woman in the face with my fists. When I saw what I was doing I wanted to run and get away from there. I do remember of seeing three or four children riding a bicycle.

"The question was asked me, 'do you remember seeing a man, or having a man talk to you?' I do not remember him.

"I run till I got to Fourth Avenue and hailed a taxi and got a ride as far as the railroad tracks on the main road to the post. From there I walked to the barracks. My hand was bleeding and the right side of my face was swelled up. I told some boys who seen me I had been in a fight. Harvey L. Carignan. I have made this statement consisting of this page and four others to Paul C. Herring, who has identified himself as U. S. Marshal. He has made me no promises or no threats. I believe I need medical attention and should receive it before I am allowed to go out into public. Harvey L. Carignan." That is all.

Q. Now, Mr. Herring, did you ever have any conversation with Mr. Carignan following this statement to which you have just testified, relative to a hat?

A. Yes, sir.

338 Q. Let me make it more specific. Did you have any conversation with him relative to a hat identified as Plaintiff's Exhibit 3, being this hat?

A. Yes, sir.

Q. What conversation is that?

A. I asked him where he had gotten this hat from. I showed him the hat and showed him the picture of himself with the hat on, and he said he had gotten it from one of his buddies. I asked him who that buddy was and he told me it was either a Corporal or Sergeant Sylvester.

Mr. BUTCHER: I would like Mr. Herring to fix the date of this conversation, your Honor. It hasn't been fixed. It is important that we know if it occurred on the day he took the statement or later.

A. Yes, sir, it was on the 19th.



Q. Was it your thought from his previous conversation that he knew that this shirt was located somewhere in that railroad area, along the right of way?

A. He didn't say that he knew it; no, sir, but he said that he thought that perhaps he had thrown the shirt away between the time he left the taxi and the time he got to his barracks, and that was the route he had taken to get to his barracks.

Q. But you found no shirt?

A. No, sir.

Q. When you got to the barracks, did you go in?

A. Yes, sir.

Q. And what was the purpose of your going into the barracks?

A. We went into the barracks. I asked Mr. Carignan if it was possible that the shirt could still be in the barracks. He said "It's possible", and his clothing, I believe, was brought out, and he looked through them himself and said that the shirt wasn't there.

Q. And then did you bring Mr. Carignan back to town, following that?

357 A. Yes, sir.

Q. And placed him back in custody?

A. Yes, sir.

Q. Now, I am just going to ask you two more questions and then I will release you, Mr. Herring. These questions will go back and pertain to one small matter in connection with the cross examination that occurred at the time of the admissibility or determination of the confession being admissible. I want you to think very carefully, Mr. Herring. We are anxious to know if you possibly can tell us in your description of the interviews you had with Mr. Carignan at the time you were making the investigation and attempting to obtain a statement from him as to whether at any time in the evening, perhaps Friday evening or Saturday evening, Mr. Carignan, together with you or some other officers were in your offices in the evening and perhaps up until midnight at any time?

A. No, sir.

Q. That did not occur?

A. No, sir.

Q. Were you ever there together in the early part of the evening?

A. Possible; I don't recall it. I don't—to my recollection I don't believe he was there after perhaps 6:00 or

7:00 o'clock, and I don't even recollect him having  
358 been there that late.

Q. Do you recall going to the Anchorage Grill on the second occasion and having dinner and then returning to your office?

A. I don't recall returning to my office; I believe we returned him to the jail.

Q. Now, you also stated in your examination in chief and your cross examination—this is the second question—and your cross examination on admissibility, that Mr. Carignan had told you some other things, and particularly in connection with his early life, that you felt had a bearing on this matter. Will you relate, if you can, what he told you?

A. Yes, sir. He related, or he gave me, in case you don't know it, he gave me a statement—that is, some couple days after the other statement. He had written down his life history and gave it to me in writing. It is available, if you prefer to have that.

Q. If you recall what he told you, that is sufficient.

A. Yes, sir. I recall that he told me a great deal of his early life. As a boy he was placed in a reformatory, and in this reformatory—

Q. Did he tell you why he was placed in there?

A. He said from an accumulation of small things, I believe.

Q. Did he tell you because he didn't have a home?

A. He told me that his home had been broken up;  
359 yes, sir—that is, I believe his father and mother were separated, and that he was treated very badly while he was in this reformatory and while there he saw many sex orgies amongst the boys, that masturbation was quite common amongst them, and—

Q. Well, Mr. Herring, did he tell you his age when he went into that institution?

A. Yes, sir, he did, but I don't exactly remember it. I believe it was eleven or twelve years old, something like that. I wouldn't be sure as to that. And he told me of particular instances where some of the other inmates of the reformatory had forced him to take part in these orgies, sexual orgies, I should say. He told me of one instance where he and another boy went into the barn and had sexual intercourse with a calf.

The COURT: Well, I am inclined to think that unless you are bringing this out for the purpose of throwing light on the deeds—

Mr. BUTCHER: I didn't, of course, anticipate that the Marshal would tell this. I wanted him to tell the chronological order that he was put into the reform school and then into the Army.

The COURT: Well, but even that, as I see it, is irrelevant unless you contend that it is shown for the purpose of shedding light on the circumstances under which  
360 Plaintiff's Exhibit 14 was obtained.

Mr. BUTCHER: Your Honor, I think it is all relevant to the taking of the statement.

The COURT: If that is your theory, why you may proceed then.

Q. Did he tell you what happened after he left the reformatory, where he went?

A. Yes, sir. He went directly into the Army. As I recall it, they took him from the reformatory to the recruiting station where he was given an examination, physical examination, and he went back to the reformatory and in a matter of several days, I believe, they were notified that he had been accepted for the Army, and he was taken back from the reformatory to the recruiting station and was taken directly into the Army.

Q. And then after that, do you know where he went to, in the Service?

A. After some little time—I forget, a matter of a few months—that he was brought to Alaska in the Army, served, I believe, at Fort Richardson for a short while and was later transferred to Adak and upon the near completion of his enlistment, he was transferred from Adak to, I believe, Fort Lawton, where he had some other experiences, and he decided that perhaps Adak had done something for him and that if he could come back to

361 Adak, that he might get over his abnormal sexual tendencies, and he re-enlisted in the Army with that thought in mind, and instead of sending him back to Adak they sent him to Anchorage, and after he came to Anchorage, for the first few months, he said, he was all right. Some of his old buddies were here. They were pretty clean fellows, and he ran around with them and had no trouble.

Q. Now, Mr. Herring, from that time on, as far as you remember his story, he was here at Fort Richardson up until the present time?

A. Yes, sir, as far as I remember.

Q. Now, when he told you that story then, did you tell him of some of your difficulties as a boy, as a young boy?

A. I told him that our environment had been very similar. As a boy I was in an orphans' home myself, from the time I was four years old until I was fourteen, and that I had gone directly into the United States Navy from an orphans' home, but that I had tried to do something with my life.

The COURT: Well, now, I am inclined to think that this is not of sufficient relevancy to be admitted unless you can point it out.

Mr. BUTCHER: I will abide by your ruling, your Honor, and I am through with the witness.

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### Re-direct Examination.

By Mr. COOPER:

Q. Mr. Herring, I believe you testified on cross examination in reply to a question put to you by Mr. Butcher that Mr. Carignan had gone into a little more detail in some oral conversation that you had with him relative to the blows that he struck against Mrs. Showalter, than was contained in the statement. Was that your testimony?

A. Yes, sir.

Q. Now, just what conversation did you have with him relative to that?

Mr. BUTCHER: Now, I object, your Honor. Mr. Herring has been examined in chief and apparently adduced all the testimony that Mr. Cooper desired to be produced. Now, this is not rebuttal with anything that was brought out by cross examination, but is a continuation of a story that Mr. Cooper could have produced from him in the beginning. It is not proper redirect examination, your Honor, and I object to it on that basis.

Mr. COOPER: Mr. Butcher made a great deal of to do, your Honor, over the language Mr. Herring used at the time Carignan arrived at the crime scene with reference to asking him "is this the place where you say you came to, astraddle of Mrs. Showalter, or sitting on her and beating her in the face?" Now, I think that was

363 brought out and gone into thoroughly by Mr. Butcher, and I think we have a right to clarify it here. The Court recalls he made constant reference to the statement contained—I mean the expression contained in the statement.

The COURT: Well, it is a matter within the discretion of the Court, in any event, even if it were not redirect.



examination. In view of the situation as it exists, that is, the contention that it was brought out in this way, the objection will be overruled. You may go into it.

Q. Go ahead.

Mr. BUTCHER: May the record show an exception, your Honor?

Mr. COOPER: If the Court please, may I make an inquiry at this time—I may be in error, and I would like to be corrected if I am. It is my understanding that an exception is noted as a matter of course on any adverse ruling. Am I correct in stating that?

The COURT: Yes.

Mr. COOPER: Thank you.

A. At one time during my conversation with Mr. Carignan in the grand jury room I asked him if he would show me—

Mr. BUTCHER: Your Honor, I think the date should be fixed.

A. On the 19th of September; I asked him if he would show me his position when he came to, pounding  
364 Mrs. Showalter in the face with his fists, and he got down on his knees and told me that he was sitting astraddle of her. I am too fat to exactly show you what his position was. He was down on his knees and his feet were to one side, and astraddle of the woman.

Q. Now, Mr. Herring, did you ever call Mr.—did you ever have any conversation with Mr. Carignan relative to the identity of the woman that he accosted at Ninth and A?

Mr. BUTCHER: Your Honor, I didn't hear that question. Will you repeat it?

Q. I asked; did you have any conversation with Mr. Carignan relative to the identity of Mrs. Showalter?

A. Yes, sir.

Mr. BUTCHER: I object to that as a leading question, your Honor.

The COURT: As what?

Mr. BUTCHER: As a leading question.

The COURT: It is directing his attention to a conversation about identity. It doesn't lead him into making any particular answer. Objection overruled.

A. Yes, sir.

Q. And what was that conversation?

A. I showed him pictures of Mrs. Showalter's body and asked him if he could identify them, and he said "No". I then showed him a picture of Mrs. Showalter, fully

365 clothed and standing up, alive, and asked him if he could identify her as being the woman, and he said, "Yes, it looks like her." I asked him if he remembered what color of coat she had on, the woman that he said he had met in the street and later taken into the lot, and he said no, that he could not recall the color of her coat or any of her clothes.

Mr. COOPER: That is all.

Mr. BUTCHER: No further questions.

(Witness excused.)

The COURT: Call your next witness.

Mr. COOPER: If the Court please, at this time my office has contacted the office of Dr. O'Malley and learned that his office had been informed that he was expected yesterday by plane. Up until eleven o'clock last night, and so far as we know, so far this morning, Dr. O'Malley has not arrived in the city. In accordance with the stipulation in which counsel for the defense and I previously entered, I would like at this time to introduce the affidavit of Dr. O'Malley.

The COURT: You may do so.

Mr. BUTCHER: May I inquire of Mr. Cooper if Dr. O'Malley is under subpoena?

Mr. COOPER: My notes don't reflect that he is, your Honor, and I assume that it was because of the stipulation that was entered into between counsel that if he was not here, the affidavit would go before the jury.

366 Mr. BUTCHER: I have no objection to the affidavit, your Honor, but I want the right to call Dr. O'Malley if he returns before this trial is over, to interrogate him, which I haven't had the opportunity to do.

The COURT: You may call him at any time if he returns before the case goes to the jury.

WHEREUPON the exhibit was marked Plaintiff's Exhibit No. 15.

The COURT: Do you wish to read this exhibit?

Mr. COOPER: Yes, I do, your Honor. I am reading to you from Plaintiff's Exhibit No. 15. "Affidavit, United States of America, Territory of Alaska, ss. Personally appeared before me, the undersigned, the United States Commissioner and ex-officio Justice of the Peace of the Anchorage Precinct, Anchorage, Alaska, one Dr. James E. O'Malley, who having been first duly sworn, upon oath deposes and says.

"At approximately 6:30 a. m. August 1, 1949, I was called to a vacant lot in the vicinity of 9th and A Street,

Q. Now, Mr. Herring, at a later date did you visit the scene of the crime at Ninth and A with Mr. Carignan?

A. I visited the scene of the crime on the same day, on the 19th; yes, sir.

Q. And relate what happened upon your arrival there at the scene of the crime.

A. On my arrival, the four of us went out together. I asked Mr. Carignan if he would care to go out to the scene of the crime and try to identify it for us and he said he

339 would, and went out in the car—I believe it was Detective Miller's car—and Mr. Twist of the—I don't know if he belongs to the C. I. D. or O. S. I., the two services are not clear in my mind; he belongs to one or the other—and Mr. Carignan and I were in the back seat. When we got to the scene of the crime he got out of the car and I asked Mr. Carignan, I said, "Harvey, can you recollect this as the place that you told me that you came to, sitting on top of a woman pounding her in the face?" He stood there a moment and walked out into the lot, and he looked around, and he said, "Yes, this is the place," and I says "Is there any way in which you can positively identify this as being the place?" He said, "Yes, by the alley across the street." I asked him what peculiarity of the alley would enable him to identify that as being the spot and he told me, because, he says, "When I came to, sitting on top of the lady pounding her in the face, I saw four little boys come out of that alley across the street and one of them had a bicycle," and, he says, "after they passed, I got scared and got up and ran back towards Fourth Avenue."

Q. Now, did you have any conversation with him relative to what had happened to his shirt and pants that he wore on that occasion?

A. Yes, sir. I asked him how he was dressed and he told me he was dressed in a pair of pants that had been  
340 dyed darker. They were G. I. pants and they had been dyed darker, and a khaki shirt, and he also said he had on a T-shirt under his khaki shirt, and that after he got to Fourth Avenue he got a taxicab to take him back to the base. He got out of the cab at the railroad crossing just before you enter Fort Richardson and walked to his barracks and when he got to his barracks he was wearing a T-shirt, and that he presumed that he must have thrown the shirt away between the time he left the taxicab and the time he got to the barracks, but he had no distinct recollection as to whether he had or not; all he knew for cer-

tain was that when he got to the barracks he had on a T-shirt and didn't have on a khaki shirt. I asked him at the time if he minded going over that route with us so that we might find the shirt, and he said that he didn't mind, so we drove to the railroad crossing. Lieutenant Barkdoll and I, at that time, got out of the car with Mr. Carignan and walked across the route that he pointed out to us; that is, he lead the way. We walked from the crossing to his barracks, but we found no shirt and the trousers he told me had belonged to one of the men in the barracks whom I later learned was Corporal Miller, I believe.

Q. Mr. Herring, do you know whether or not any jewelry, anything in the nature of jewelry, was recovered from the body of Mrs. Showalter?

341 A. Yes, sir.

Q. Do you recall what it was?

A. Yes, sir; there was a small diamond ring. I would say it is between a third and a quarter of a carat, in a white setting, and a Gruen wristwatch, and a small gold chain with a Social Security number on one side and the name Showalter on the other side, and an inexpensive piece of costume jewelry, a ladies' pin, and I believe there was part of a nugget earring—a pair of nugget earrings that had been broken, but there were two small nuggets and the screw pieces for the earrings.

Mr. COOPER: Your witness.

#### Cross Examination.

By Mr. BUTCHER:

Q. Now, Mr. Herring, we will go back where we started from at the beginning of the examination I made, as to the admissibility of the so-called statement. Will you tell me now when you first learned, and under what circumstances you first learned, of the incident of this crime?

A. I first learned of it when I came to work on the morning of August the 1st. Someone in my office—I don't recollect exactly who—told me that there had been a murder that night, on the night of July 31st.

Q. That was approximately 8:00 o'clock?

342 A. Yes, sir, that was approximately 8:00 o'clock.

Q. What did you do when you learned of that fact?

A. I inquired as to whether any of our men were on the job or not, and I was told that Mr. Hoff was on the job.

Q. He is one of your Deputy Marshals?

A. Yes, sir.



Q. And did you then proceed to the scene of the crime?

A. No, sir, I did not.

Q. Did you go out there at any time that day?

A. Yes, sir, I went out—I would say, possibly—9:30 in the morning.

Q. When you got there, was the body still there?

A. No, sir.

Q. It had been removed?

A. Yes, sir.

Q. Did you make an investigation at that time?

A. I didn't make an investigation—I assisted; yes, in looking for murder weapons and questioning some of the neighbors around there; yes, sir.

Q. Did you find anything in the nature of a weapon?

A. No, sir; we found a piece of an old jack there that we thought might have been a weapon, but it disclosed no blood, and then I think we found an iron pin, and it turned out there was no blood on that, and we found a wooden club.

There was no blood or hair on that.

343 Q. There was what on that?

A. I say, there was no blood or hair on that.

Q. During the time you were there, were any other police officers there?

A. Yes, sir.

Q. Who else was there?

A. Oh, there were a number of them. I don't remember who all was there, Mr. Butcher. There were several of them around there; just who all was there, I can't tell you.

MR. BUTCHER: Just a moment, your Honor.

Q. Now, on the occasion of the trip you took out to the scene of the crime, the second time, I assume it was the second time—the only other time you related—when Mr. Carignan was present; was that the second time?

A. No, sir; I was there several times.

Q. Now, referring to that particular time, the time when Mr. Carignan was present, now was it immediately following his giving you the statement which you have read to the jury, that you suggested to him that you go to the scene of the crime?

A. I believe it was; yes, sir.

Q. And that occurred, of course, in your office, or the grand jury room?

A. Yes, sir.

Q. And do you recall who you picked up to go out

344 there? Did you go to the Police Station and pick up any police officers?

A. Yes, sir, I went to the Police Station and Mr. Miller and Mr. Twist—we went out in Mr. Miller's car.

Q. Mr. Twist was the O.S.I. man?

A. Either O.S.I. or C.I.D.

Q. You went out in Mr. Miller's car?

A. Yes.

Q. Then you and Mr. Carignan walked to the Police Station, is that correct?

A. I assume it is correct; I don't know. I would assume that it is correct; yes, sir.

Q. Now, when you got there, did you in any way suggest or point out the scene of this crime to Mr. Carignan?

A. We got out of the car and I said, "Harvey, do you recognize this as being the scene of the crime, as being the place where you told me you came to, sitting on top of a woman pounding her in the face?" That is the words that were used in connection with it.

Q. Well, when did he tell you those words?

A. He told me them in the statement.

Q. Does it say, and did you read in the statement, that he was sitting on top of a woman pounding her in the face?

A. That is the words that he told me, and as I remember, that is substantially the words in the statement.

345 Q. Will you check that page and read that again, and ascertain if your statement now is correct?

The COURT: Well, the question is not whether his statement now is correct, but whether he said that to him at that time.

A. I have found it here.

Mr. BUTCHER: Well, your Honor, it is the Marshal who told Mr. Carignan—

The COURT: For instance, if he didn't recall it correctly when they got out to the scene, and he used other language than was used in this statement, why the question is still whether he used that mistaken expression, not what is in the exhibit itself.

A. I found it here, your Honor, if he wishes me to read it.

Mr. BUTCHER: Later he said, your Honor, that he used the words that were in the statement. Now, if he used the words that were in the statement—

The COURT: He said that they were in the statement. If you want to know what words he actually used or what

words he actually used out at the scene of the crime, you can't go to the statement for it, you have to go to the recollection of the witness as to what he recalled that he said at that time.

Mr. BUTCHER: That is correct, your Honor, but I have a right to examine the recollection of the witness, and  
346 when he relies on the statement for what he said, then we can only go to the statement to find out what was actually said.

The COURT: The question is, is it important to show that on that date he was mistaken as to what was said?

Mr. BUTCHER: It is important to show what he actually said out there, and it would certainly prejudice the case if he were allowed to say that Mr. Carignan was sitting on top of a woman pounding her in the face, when the statement does not say so.

A. Your Honor, I have found the question here, in case you want me to answer it. I have found the statement.

Q. Will you read it again and see if—

A. "The first thing I remember was me sitting and hitting a woman in the face with my fists."

Q. Now, recalling your last statement—

A. That is in line four—five—well, in the last four lines from the bottom of page three.

Q. Now, Mr. Herring, recalling your last statement to Mr. Carignan, you said to Mr. Carignan "Now, show me the place where you were sitting on top of this woman pounding her in the face." That isn't, then, what you said to him, is it?

A. Well, it is not what I said; no, sir. I said, "Harvey, do you remember this as being the place where you told me  
347 that you came to, sitting on top of a woman beating her "in the face with your fists?"

Q. That is what you told him?

A. Yes, sir.

Q. And that you got that information or that statement, from this statement which you have read?

Mr. COOPER: Now, if the Court please, I don't believe he has testified to that.

The COURT: Oh, it doesn't make any difference where he got it, if he was mistaken. The question still is not what is in the statement but what he said there.

A. If I might elaborate, Mr. Carignan told me this story orally several times before it was in writing, and in much more detail than he has here in writing.

Q. Well, then, you could have heard the words that you have just uttered on some other occasion and not gotten them from the statement?

A. The words that I uttered are substantially what were in the statement.

Q. Except for the part where he was sitting on top of her?

A. The statement said he was sitting on her pounding her in the face with his fists.

Q. This statement—you better read it again, Mr. Herring.

Mr. COOPER: Oh, if the Court please, that is quibbling.

The COURT: We are not going to waste any more time on that. The question is not what was in the statement, but what he said on that occasion, even though  
348 he were mistaken about it.

Mr. BUTCHER: Well, your Honor, I believe under the circumstances that I have the right to examine the recollection of this witness. If this witness's recollection is faulty on one point, it can be faulty on other points. I have a right to go into that, and I shouldn't be prevented from going into it.

The COURT: Well, he has already said that he made oral statements to him. Now, it is immaterial whether his recollection or whether the language that he used out there was based on the recollection of some oral statements or not; the question is what he used out there.

WHEREUPON the jury was duly admonished and Court adjourned until 10:00 o'clock a. m. December 14, 1949, reconvening as per adjournment with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:

The COURT: Do you have something to present?

Mr. BUTCHER: Yes, your Honor. Your Honor will recall that yesterday I called attention of the Court to summoning or subpoenaing certain witnesses on behalf of the defendant and I have Mr. Carignan's affidavit which lists the names of the witnesses he desires to call, and the reasons why he is calling them, in accordance with Rule  
349 17B of the Federal Rules of Criminal Procedure.

The COURT: Do you wish to be heard on this?

Mr. COOPER: Yes, your Honor; I don't believe the affidavit goes far enough under the requirements of our Federal Rules of Criminal Procedure, and there is no indication here as to how the testimony that may be given by these witnesses would be at all material, and is something



in the nature of establishing an alibi, I believe it should be set forth in the affidavit.

The Court: Well, the law is that before process may issue to compel at the expense of the United States the attendance of witnesses, that their testimony must be set forth in the affidavit, so that it may be determined by the Court whether it is material or not. In other words, witnesses are not subpoenaed at the expense of the United States unless it appears from somebody's affidavit that the testimony that will be given will be material, and this affidavit falls short of that, so that the Court will have to deny the motion without prejudice to filing another affidavit setting forth the substance of the testimony.

Mr. BUTCHER: May I be heard just a moment, your Honor? Your Honor, the activities of the defendant on the day in question, the 31st of July, the activities of the defendant during the entire day, is obviously material. It is just as material as any testimony about his activities  
350 ties on that day as have been adduced here and introduced by the plaintiff. I have stated that these witnesses will testify as to his activities on that day, and by that I mean all of his activities, and I have no way, your Honor, no way possible within my means and no funds at my disposal to hunt these witnesses down, who are military personnel, and reduce their testimony to separate affidavits, and it is my opinion that the rule does not call for that. I have read the rule and I have prepared the affidavit in accordance with the rule, and while the affidavit may not in detail set forth their testimony, that is impossible under the circumstances and it can't be done, and I believe that to refuse to subpoena these witnesses for this defendant, who cannot subpoena witnesses himself, would be a denial of his rights and a prejudice in his trial.

The Court: Well, the activities of the defendant on that day are undoubtedly in a sense material, but the law requires that he set forth what the witnesses that he wishes to subpoena will testify to. The Court can't tell from an affidavit in such general language as this one whether their testimony is material or not, and the further reason for that requirement is that the United States Attorney may elect to stipulate that if the witnesses were produced, they would testify to that effect. Now, he can't stipulate to anything here. It may be that at this late stage that you  
351 are handicapped, of course, in interviewing these witnesses beforehand, but if the defendant has any idea that they know something of his activities, he

could certainly set forth what he believes in good faith they would testify to. I have no recourse except to deny the motion. You cannot determine the law merely from reading the rule, it is the decisions under it, because after all this rule is merely declaratory of the previously existing practice.

Mr. Butcher: Well, your Honor, I simply followed the rule. The rule says—the fragment I am reading in the middle of the rule—that the “address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense” and nowhere does the rule call for setting forth the evidence in detail as to what the witness would testify to.

The Court: Well, the testimony of each witness must be set forth before the Court can determine whether he should be subpoenaed, and as I say, it is the decisions rather than the text of the rule that governs, and I certainly would be inclined to be very liberal in allowing any motion of this kind, but it seems to me that the minimum requirements ought to be met here. That would be certainly an unwarranted precedent for the Court to set. Motion is denied.

Mr. BUTCHER: If I complied with the precedent of the Court as to what is required, your Honor, that cannot be done unless I personally or Mr. Weir go to the Post. These boys have been called on the telephone and been requested to come to my office, and none of them have appeared, your Honor. It is going to be necessary that I go to the Post and catch up with them myself, wherever they happen to be, and attempt to produce this testimony and have it set forth in an affidavit, and if the Court does insist upon that and I can do it, then I will be prepared to proceed, but I certainly haven't been able to do it at this time, and I have no funds with which to do it.

The Court: But you know that the further requirement here before any continuance is asked is that counsel be diligent in procuring testimony and witnesses, and you have represented the defendant for a considerable length of time, and matters of this kind should have been attended to long ago, long before the trial. In other words, there would be a lack of a showing of diligence that would warrant any continuance, so if you wish to be left to your own devices you will have to do it on your own time and not the Court's time, because the Court can't grant a continu-

ance now for evidence that was available and within your knowledge or the defendant's knowledge all the time.

Mr. BUTCHER: Well, your Honor, there has been no lack of diligence. Your Honor will recall we have just gone through another case involving this defendant, and which took place just a short time ago, and that also was 353 a case tried in *forma pauperis*, and it required a great deal of work and it was given without stint. There is only so much time in a day, your Honor, in which to perform necessary duties. We assumed, perhaps erroneously, that the District Attorney's office would subpoena all the soldiers who were with the defendant on that day. They have subpoenaed some of them, and those names are stricken from our list. We were intending to subpoena Frank Kellner—Mr. Kellner testified here—and also one of the other soldiers, and the Government saved us that.

The COURT: Well, if the United States Attorney wishes to subpoena these witnesses to see whether they know anything, he may do it independently of an order of the Court, and the Court would have nothing to say about that, but when the Court is asked to issue process at the expense of the United States for the attendance of these witnesses, when their testimony is not set forth, the testimony of each witness set forth separately, from which the Court could determine its materiality, the Court has no alternative but to deny the motion without prejudice, and that is the order. Call your next witness.

Mr. COOPER: I believe Mr. Herring was on the stand, when we recessed, your Honor.

WHEREUPON the witness PAUL HERRING resumed the witness stand and the Cross Examination by Mr. BUTCHER was continued as follows:

Mr. BUTCHER: May the Reporter read, your Hon- 354 or, the last question that was asked before and answered?

The COURT: Yes.

Court REPORTER: The Court would not permit the last question to be answered, so there is no answer. There was questioning about a certain word in the statement. The last question was "This statement—you better read it again, Mr. Herring."

The COURT: I think your last questioning concerned whether he was not mistaken in some language that he used, with reference as to what was said at the scene of the crime, and of course you may go into that. My ruling

merely went to the fact that the language in the so-called confession would have no tendency to show that the language the witness said was used at the scene of the crime was or was not used. In other words, if you want to show that the witness was mistaken in the language that he used at the scene of the crime, you have to go to something else than the so-called confession.

Q. Some conversation occurred, I believe, Mr. Herring, after you had gone out to the scene of the alleged crime, in connection with a shirt. Do you recall testifying yesterday as to some conversation in connection with a shirt?

A. Yes, sir.

Q. Following that conversation, I believe you testified that you and Mr. Carignan and Mr. Twist, perhaps, and someone else, drove from Ninth and A to the M. P. 355 gate at the Post; is that correct?

A. We drove to the railroad tracks, just this side of the M. P. gate; yes, sir.

Q. And I believe you stated you and Mr. Carignan left the car and proceeded along the railroad tracks?

A. And Mr. Barkdoll; yes, sir.

Q. Mr. Barkdoll was with you?

A. Yes, sir.

Q. In which direction did you proceed—to the left or to the right?

A. We went to the right, sir.

Q. To the right?

A. Yes, sir.

Q. That would be, then, to the southeast?

A. I presume so; I am not familiar with directions here yet.

Q. That is to the right as you approached the Post?

A. Yes, sir.

Q. And how far along the tracks did you go?

A. Well, I would say it was a matter of perhaps two or three hundred yards, and it took us from the tracks up over a hill and we walked across what I would take to be a baseball diamond or a recreation field of some kind, from there on into the barracks.

Q. What was the conversation, if any, that occurred during that walk, if you recall?

356 A. Well, I asked him several times if he could recollect having taken his shirt off at any place there and then thrown it away. I don't recollect any other particular conversation. As far as I can recall, the conversation was concerned with a shirt that was missing.



Q. Do you live in the barracks occupied by Mr. Carignan, or that was on the 31st day of July?

A. Yes, sir; I did, sir.

Q. Calling your attention to that day, the evening of that day, do you recall seeing Mr. Carignan?

A. I recall seeing him late in the evening.

Q. Have you any idea as to the time you might have seen him?

384 A. It was shortly after 10:00 o'clock. There was a crap game on in the barracks, and the lights went out at 10:00 o'clock. This crap game moved to the latrine. Shortly after the crap game moved to the latrine, Private Carignan came in.

Q. Were you able to observe any unusual conduct on his part, or any indication of an unusual condition in Mr. Carignan?

A. Well, he was drunk.

Q. How did you determine that?

A. Well, he was quite wobbly in his walk, quite mush-mouthed in his talk, glassy-eyed and I have saw Private Carignan drunk on several occasions and that was about as drunk as I have ever saw him.

Q. And did you observe anything else on that occasion—what else occurred?

A. He appeared to have been in a fight; his clothes was messed up.

Q. Did you see anything indicating, on his facial characteristics or his limbs, that he had been in a fight?

A. Yes; he did have some blood on him.

Q. Where was that?

A. Just where—I don't recall that, sir. I do recall him having blood on his clothes that night, coming in drunk.

Q. Did you observe his hands?

385 A. One of his hands, I believe, was bruised or had some blood on it, or something. I didn't observe it very closely. I didn't pay much attention. Some remark was made about his being in a fight.

Q. Do you remember what Private Carignan did on his coming in the barracks? Did he go to bed or did he go out again?

A. He walked through the latrine for a few minutes and then out and into the barracks and laid down on the bed, flopped down on it, with his clothes on, and slept there the rest of the night.

Q. You remained there in the barracks the rest of the night yourself?

A. Yes, sir.

Q. What time did you retire?

A. Sometime between midnight and 1:00 o'clock, I would say.

Q. Did you observe him there at that time?

A. Yes, sir, I did observe him in bed at that time. I was Barracks Sergeant at that time.

Mr. BUTCHER: That is all.

### Cross Examination.

By Mr. COOPER:

Q. Where did you say you were when Carignan arrived?

A. In the latrine, sir.

Q. You say there was a crap game going on there?

A. Yes, sir.

386 Q. How many of you were engaged in the crap game?

A. I don't believe I was engaged, sir. I was a bystander.

Q. How many of them were in it?

A. I would say close to half a dozen; something like that, sir.

Q. Do you know who they were?

A. Just offhand, I don't recall.

Q. And you say Mr. Carignan came into the latrine?

A. Yes, he did.

Q. And that is when you first observed him?

A. Yes, sir.

Q. And how long was he in the latrine?

A. He wasn't in there more than a couple, three minutes at the most.

Q. Then where did he go from there?

A. Into his bed.

Q. And did you follow him to his bed?

A. Yes. I know Carignan very well, and I escorted him into the barracks, went with him.

Q. And you say there was blood on his clothes?

A. I noticed some blood on him; yes.

Q. What became of those clothes, do you know?

A. No, sir, I don't.

Q. You say you also noticed some blood on his hand?

A. Yes, sir. It looked to be like he had been in a

387 fight. I didn't observe very closely just what was wrong with him.

Q. Did you say you were a good friend of Mr. Carignan's?

Mr. BUTCHER: He didn't say that, your Honor. If Mr. Cooper wants to ask him, it is all right—he didn't say so.

The COURT: Well, I thought he did say so.

Mr. COOPER: I am asking him if he did say it, your Honor.

The COURT: Objection overruled. I thought he did say so.

A. I said I knew him real well.

Q. And a buddy of his?

A. No, sir, I never buddied with him.

Q. But you are in the habit of taking care of him when he comes home after his drinking bouts?

A. I take care of anybody that comes in the barracks and in that condition.

Q. And you have done that with Mr. Carignan before?

A. No, sir, I never saw him that drunk before.

Q. Didn't you say you had observed him in the same condition before?

A. Not that drunk.

Q. You don't really know how drunk he was from your observation, do you?

A. He was pretty drunk.

388 Q. Now, have you discussed this case with Mr. Carignan, Mr. Thurman?

A. No, I really haven't.

Q. You never talked to him about it at all?

A. About the case, no.

Q. Well, have you had any conversations with him since this incident happened?

A. Yes, sir, I have.

Q. But nothing about what happened that night?

A. No, sir, I didn't.

Q. You have had no discussion with him whatever as to how drunk he was that night?

A. No, sir, I never discussed it with him.

Q. Have you discussed it with Mr. Butcher or Mr. Weir, his attorneys?

A. No, sir, I really haven't.

Q. You haven't discussed it with anybody?

A. No, sir.

Q. So, as far as you are aware, Mr. Thurman, the only time your testimony has been mentioned relative to the

drunken condition of Mr. Carignan, either to Mr. Carignan, Mr. Butcher or Mr. Weir, is from the stand here in the courtroom today; is that correct?

A. No, sir. I informed Mr. Butcher as to my knowledge of him being that drunk that night, but I did not  
389 discuss it with him.

Q. Did Mr. Butcher ask you any questions about him?

A. No, sir, he didn't.

Q. You just told him that Carignan was drunk that night and that was all there was to the conversation?

A. That I knew what time he came in, approximately, and he went to bed.

Q. Did he ask you to describe Carignan's appearance?

A. I believe he might have asked me if he really looked drunk.

Q. And where did this conversation take place?

A. A few minutes ago.

Q. And you hadn't talked to Mr. Butcher about the case before that?

A. Yes, I had.

Q. Well, where was the other conversation?

A. In his office.

Q. How long ago?

A. Maybe a week or better ago.

Q. Now, Mr. Thurman, have you ever been convicted of a crime?

A. No, sir.

Q. Have you ever been court martialled?

A. No, sir.

Q. At the particular time that —

Mr. BUTCHER: Now, your Honor, I object. He has asked if he was convicted, and he said "No". He has no  
390 right to ask him if he has ever been court martialled.

It doesn't come within the rules, your Honor, as to how to impeach a witness or attack his credibility.

The COURT: Well, he has already answered that question that he hadn't, and you hadn't objected to it, so—

Mr. BUTCHER: I am objecting to any further interrogation along that line.

The COURT: Well, the objection should be made at the time the question is asked. You may proceed.

Q. Where do you reside, Mr. Thurman?

A. For the time being, Mountain View.



Q. Do you rent or is that your own home?

Mr. BUTCHER: I object to these questions, your Honor, unless the District Attorney can show the materiality—where he resides, where he lives, whether he owns his own home—has got nothing to do with the issues of this case.

The COURT: Objection overruled. The witness can always be questioned about the environment in which he lives.

Q. You live in Mountain View?

A. Yes, sir.

Q. Are you a family man?

A. No, sir.

Q. Were you residing in Mountain View on the 31st day of July, 1949?

A. No, sir, I wasn't.

391 Q. You purchased your home since that date?

A. No, sir, I owned it before that.

Q. Were you building your own home out there?

A. No, sir. I own a trailer.

Q. You own a trailer?

A. I own two.

Q. Are you constructing a home out there?

Mr. BUTCHER: Now, your Honor, this has nothing to do with the man's environment. This can't possibly have any bearing on the issues.

The COURT: I don't see its materiality myself.

Mr. COOPER: I won't pursue this questioning. That is all.

A JUROR: Your Honor, may I ask the witness a question?

The COURT: You may.

A JUROR: Sergeant, can you recall how Mr. Carignan was dressed the night that he came into the latrine?

A. I recall he was dressed in civilian clothes. He wasn't in uniform. The exact piece of clothes—I wouldn't now try to identify the exact garments he had on that night.

A JUROR: Do you recall if he had a shirt on?

A. It seems that he had a brown jacket on when he came in the barracks.

A JUROR: That is all.

392 By Mr. COOPER:

Q. Do you know whether or not he had a hat on?

Mr. BUTCHER: I object to that question, your Honor. The District Attorney has stated "no more questions" and I have a right now to re-examine, and if he wants to re-cross he may do so.

The COURT: I don't know whether he is proceeding on the theory that this questioning gives him the right to extend his cross examination.

Mr. COOPER: I won't quibble about the order of it, your Honor. I am willing that Mr. Butcher examine him further along those lines.

Mr. Butcher: To be in accord with the District Attorney, I will consent to his continuing of the cross examination.

Q. Did you notice whether or not Mr. Carignan had a hat on?

A. No, sir, he didn't have a hat on that night.

Q. Do you recall what color pants he had on?

A. I don't recall that, sir.

Q. But you have a distinct recollection that his eyes were glassy, is that correct?

A. He was drunk; yes, sir.

Mr. BUTCHER: Now, he has covered this before, your Honor, and this didn't result—regarding drunkenness—from the questioning of the juror, and he should confine himself to that.

The COURT: Well, but when the witness answered in response to the juror's question about the clothing he wore, it opens up that subject, and it becomes proper for the District Attorney to question him as to his powers of observation about other things, not merely his clothing, so an examination just can't be confined to a matter somebody brings out in one question.

Q. Mr. Thurman, do you know a soldier by the name of Kellner?

A. Yes, I do.

Q. Do you know a soldier by the name of Evans?

A. Yes.

Mr. BUTCHER: Now, your Honor, your recent ruling was that he has a right to question him with regard to his powers of observation. Now, this particular line of examination it appears is not confined to that, then I think your Honor's ruling would prevent Mr. Cooper from proceeding now.

The COURT: Well, I am not sure whether he ever closed his cross examination. I don't remember whether he did or whether the question by the juror was just sandwiched in.

Mr. BUTCHER: I am sure of it, your Honor. I stood up to perform re-direct examination after he said "no more questions."

Anchorage, Alaska, by the Anchorage Police Department for the purpose of examining a body lying there. I examined the body and found that death had occurred and that the stiffness of death had made its appearance.

"At approximately 8:00 p. m. on August 1, 1949, I performed a post mortem on this body which was that of Mrs.

Laura Showalter. The body was that of a well-nourished and well-developed white female apparently in her forty's. The stiffness of death had set in.

An examination of the external surfaces of the body revealed that both eyes were considerably swollen and black and blue. On both temples were areas of abrasions and bruises. On the right side, immediately above the eye, is a deep cut about  $\frac{3}{4}$  inches long. In the middle, immediately above the right eye, there was a vertical incision about  $\frac{3}{4}$  inches in length extending upwards. On the back of the head, towards the left, is a deep cut about  $\frac{3}{4}$  inches long. There was a triangular incision  $\frac{1}{2}$  inch in length on the outer portion of the left eyelid. Immediately below the right eye were lineal cuts; one of which was  $1\frac{1}{2}$  inches long and the other  $\frac{1}{8}$  inch long. The nose has been shattered and fragments of the bone which makes up its bridge were freely movable. The tongue is protruding and the lips are markedly discolored. Examination of the neck does not reveal the presence of any finger-marks, abrasions nor areas of discoloration. On the right shoulder, there seems to be a small area of abrasion which could have been made by the fingernails. This is  $\frac{1}{4}$  inches wide and  $\frac{3}{4}$  inches long. There are several small circular areas of abrasion on the right hand. On the abdomen, there was a mid-line scar, well healed, extending from the pubis, up to the navel which has been the result of a surgical operation in the past. There is also

a scar on the back of the left shoulder about  $2\frac{1}{2}$  inches in length which is well-healed. On the left buttock were some small punched-out recently inflicted lacerations resembling stone bruises, about  $\frac{1}{2}$  inch x  $\frac{1}{4}$  inch, in measurement. During the course of the examination of the head, the muscles on both sides of the head were found to be very bloody and bruised on both sides, particularly so on the left. When the top of the skull was removed, it was noted that when the bone was sawed open, it emitted a dull sound as though a crack or a fracture was present in it. There was a considerable quantity of blood; about a cupful in extent lying freely beneath the covering of the brain. Examination of the

bones of the skull revealed a fracture or a break in the bones on the left side of the head, extending down into the base of the skull. This fracture tore a large blood vessel supplying the coverings of the brain. It was noted that the temporal bone was not as thick as usually found in most individuals. This artery is known as the middle meningeal artery. It is frequently found to be ruptured in fatal skull fractures. The primary cause of death was that of a skull fracture of the left temporal bone with a rupture of the middle meningeal artery. Contributing causes of death were those of cerebral hemorrhage caused by a traumatic rupture of the middle meningeal artery on the left side of the head. The third cause of death was that of severe shock secondary to the above named causes. Signed, James E. O'Malley, Dr. James E. O'Malley,

Subscribed and sworn to before me this 25 day of 369 November, 1949. Signed, Rose Walsh, Commissioner and Ex-Officio of the Peace." The Government rests, your Honor.

The COURT: Are you ready to proceed now, or would you like a recess?

Mr. BUTCHER: Well, your Honor, in view of the ruling of the Court on the motion of the defendant to have subpoenaed at the expense of the Government the witnesses requested by the defendant, and in view of the other circumstances as I mentioned previously, the proximity of the last trial, the close setting of this offense to the last case and all the other circumstances, the fact that the defendant is defenseless without these witnesses, I can only ask the Court for a continuance at this time to permit contacting these witnesses and an effort made to procure their statements and present to the Court in the form of an affidavit, as the Court has ruled is necessary.

Mr. COOPER: If the Court please, I believe there is set forth in the affidavit that one of the witnesses desired by the defense is Glenn Evans. Glenn Evans, if the Court please, is now in the witness room and could be called by counsel for the defense at this time.

The COURT: In any event, there has been no showing of diligence here, no showing that this testimony was not known of until now and it is too late, and the affidavit does not comply with the law and hence the motion will be denied.

370 WHEREUPON Court recessed for five minutes, reconvening as per recess with all parties present as here-



tofore, with the exception of Mr. Weir, and the jury all present in the box; whereupon the trial proceeded as follows:

Mr. BUTCHER: Your Honor, we would like to make a motion at this time as is our right under the Federal Rules, and we would like to make the motion in the absence of the jury.

The COURT: Couldn't you have made this when the jury was excused during the recess?

Mr. BUTCHER: I had to consult, your Honor, with my colleague, Mr. Weir.

The COURT: The jury may be excused until called.

WHEREUPON the jury retired from the courtroom.

The COURT: You may proceed.

*Motion for Acquittal and Denial Thereof*

Mr. BUTCHER: I might say before proceeding, your Honor, that Mr. Weir is endeavoring to contact a witness by telephone and will be absent for a few minutes. Your Honor this is a motion for acquittal, based on the failure of the Government to sustain the allegations in the indictment.

WHEREUPON Mr. Weir entered the courtroom.

Mr. BUTCHER: The indictment reads "The grand jury charges that on or about the 31st day of July, 1949, at or near Anchorage, Alaska, Third Division, Territory of Alaska, Harvey L. Carignan was engaged in an attempt  
371 to commit the crime of rape by forcibly against her will attempting to carnally know and ravish one Laura A. Showalter, a woman; and the said Harvey L. Carignan, while engaged in the attempt to commit such rape, by his acts killed Laura A. Showalter by beating her on the head and face with his fists." Now, my motion consists of two points, your Honor, two points which in my opinion—and I believe the evidence will bear out my contention—that the Government has failed to prove their case, and sustain the charges of the indictment. The first is that there has been no positive identification that the woman killed was Laura A. Showalter, no witness has been produced in this court who looked at the body of Mrs. Showalter who knew her previously and identified her as Laura A. Showalter. It is true that the woman by the name of Reddick, Mary Reddick, testified that she recognized the picture of Mrs. Showalter alive in a group, but she herself was one that identified that as a picture of Mrs. Showalter. That identification, your Honor, by a person who knew Mrs. Showalter but who did not ever testify and apparently did not ever examine the body of the woman killed—that witness could

have done so and could have testified had it been Mrs. Showalter, and it would have been, we will assume, an easy thing to prove. No one else had any testimony. Of course, the police officer, Captain Barkdoll, said that he remembered

372 her as a lady that used to talk to his child, and on cross examination he had a vague recollection that

his daughter, Goldilocks, referred to this woman as Mrs. Showalter, but that identification, your Honor, I submit to the Court, is too vague and lacks the necessary positive identification necessary in a case of this kind. It is a serious charge of murder in the first degree; therefore, on the grounds that there has been no identification of Mrs. Showalter as the woman who was killed, the indictment has not been proved on that point.

The second point is, your Honor, that in order to sustain this indictment it is necessary for the Government to prove that this woman was killed while the defendant was engaged in an attempt to rape her. I submit, your Honor, that there has not been one word of evidence, not one scintilla of evidence, produced in this court by the Government to indicate that there was any intent on the part of the defendant to commit a rape, or to carnally know Mrs. Showalter. The only evidence that has been produced in this court, your Honor, is that this woman was killed and the body was found, and that is the only evidence. We have the evidence of the doctor; and in that there is no indication that a rape was perpetrated, and so there is nothing but pure supposition, conjecture or imagination to link the crime of rape with the killing of the woman, and the gist, and part of this indictment, is that the defendant must have killed the woman

373 in the act of committing a rape upon her. She was certainly completely within the power of the person who committed the deed, and rape, had it been intended,

could have been committed, and there was no evidence—and we can't leave a matter of this kind to imagination, your Honor—and, for that reason, I submit to the Court in its fairness that that aspect of the indictment has not been proved, and I ask for a judgment of acquittal.

The COURT: Well, it is true that there is no direct evidence of, you might say, the attempt to rape, but it is a reasonable and logical inference from the evidence that that was the purpose of the assault. After all, there is such a thing as circumstantial evidence, and the jury is warranted in drawing that inference. There are enough facts in the

case from which the jury may reasonably draw that inference. As to the other point, I think the evidence is merely far from conclusive as to identity, but I think it is sufficient to go to the jury, so the motion is denied.

Mr. BUTCHER: May we have the witness Evans called? I am sorry, we better have the jury, your Honor.

The COURT: You may call the jury.

WHEREUPON the jury returned and all took their places in the jury box.

The COURT: You may call the witness Evans.

374

## DEFENDANT'S CASE

GLENN E. EVANS, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

## Direct Examination.

By Mr. BUTCHER:

Q. Will you state your full name to the Court?

A. Corporal Glenn E. Evans, sir.

Q. You are connected with the United States Army at Fort Richardson?

A. Yes, sir.

Q. Are you a friend of Harvey L. Carignan?

A. Yes, sir.

Q. You have known him for sometime?

A. Yes, sir.

Q. Were you with him on the 31st day of July?

A. I was, sir.

Q. Of this year?

A. Yes, sir.

Q. When did you join his company on that day—what time?

A. About 1:30, sir.

Q. About 1:30?

A. Yes.

Q. And you were with him throughout the day?

A. Yes, sir.

375 Q. Till about what time?

A. Between quarter of nine and about quarter after nine, I would say, sir.

Q. Can you relate, as far as you can recall, your activities on that day up to the time you last saw Mr. Carignan?

A. I can.

Q. Will you do so?

A. I met Carignan at a bar. I don't know the name of it.

Q. Do you know the location?

A. Yes. I don't know the street numbers or anything like that. It is on Fourth Avenue, and it is right on the corner where you turn to go back where the old O'Hara bus line used to be.

Q. But you don't know the name?

A. No, not right off hand; no, sir.

Q. All right, you met Mr. Carignan in that bar; and what did you do?

A. We had about three to four drinks, I would say, and—

Q. What kind of drinks?

A. Whiskey, sir. And then we went across the street and got a shoeshine. After we had a shoeshine I believe we had another drink over at the place, or two; went on down, was hunting another bar on Fifth Avenue, and met a guy whose

We went with Ramsey

M. K. M.

name was Ramsey. / out to a store out in the residential district, and he had some pop bottles to turn in and  
376 after we left there we went and got a tank of gas and then we went to Fort Starns and got a case of beer and then we went to Ramsey's house. We drank most of the beer there, and then we went down to the canning company for Ramsey to pick up his wife. On the way back, picking up his wife, we got out of his car and got into a taxi and came to the Post. While we was at the Post we got in civilian clothes, got another cab and came back in. I believe that when we got back in, that we went to the White Spot, or one of the bars, and had a few drinks.

Q. Do you have any idea how many you had?

A. About four or five, sir, somewhere along in there.

Q. Do you have any recollection as to the condition of sobriety of Mr. Carignan at that time?

A. Well, sir, I was about the same as him, I guess—both of us drinking, and I know I was starting to feel it a little bit, sir. We left from there, went down to this Scandinavian—it would be hard to say how many drinks we had in there—we were in there quite a while.

Q. Would you say you had a good many?

A. I would say up to about ten or fifteen, somewhere in there, or maybe more, sir.

Q. Have you any conception of his condition after you had been in the Scandinavian Club? Were you able to observe it?



377 A. Sir, I was getting pretty drunk, and I imagine he was in about the same condition, too, because he drank the same amount.

Q. Do you know of any trouble that Mr. Carignan got in as a result of that condition?

A. Just a small friendly scuffle there inside of the bar.

Q. Inside the Scandinavian Club?

A. That is right; yes, sir.

Q. Were any blows struck, if you recall?

A. Friendly blows, sir—it was just open-handed mostly.

Q. Would you say from your observation of Mr. Carignan at that time that he was drunk?

A. Well, I would say yes. A man has to get drunk to scuffle in a bar.

Q. What do you recall of his other characteristics that would indicate that he was drunk?

A. Well, I imagine it would be—well, we was singing with the accordin player for a while, and we was buying people quite a few drinks.

Q. Were you included in the picture?

A. Yes.

Q. When did you see Mr. Carignan last?

A. The nearest I can recall, sir, is right after he bought the pistol.

Q. You were with him when he purchased the pistol?

378 A. Yes.

Q. Do you know why he purchased the pistol?

A. No, sir, I don't. He was going to take it to the Post, I believe, sir.

Q. And do you know he took the pistol back a few minutes later?

A. He told me later that he had, the next day, sir, after we had split up—that he took it back.

Q. When did you see him last that night?

A. I believe that was the last that I saw of him, sir.

Q. Could you say anything about his condition the last time you saw him?

A. Yes, sir. We was both getting pretty drunk, sir.

Mr. BUTCHER: That is all.

#### Cross Examination.

By Mr. COOPER:

Q. Now, Corporal, may I ask you a few questions?

A. Yes, sir.

Q. Do you recall any conversation that Carignan had with the accordion player there on that evening, Corporal?

A. Yes, sir.

Q. What was the general nature of the conversation?

A. A date, sir.

379 Q. Well, would you elaborate on that just a little more, tell us what you mean by that answer, when you say a "date"?

A. Well, that would be about it—I guess, just to take her out.

Q. And that is what you understood from the conversation that Mr. Carignan had with the accordion player?

A. I didn't hear all the conversation, sir.

Q. But that was the gist of it?

A. Yes, sir.

Q. That is what you gathered from the conversation, that he wanted to date her, is that right?

A. Yes, sir.

Q. Now, would you just tell us as near as you can recall—will you describe this lady that was playing the accordion?

A. Kind of a stocky woman, sir.

Q. What age—would you know?

A. Middle aged, I would say.

Q. Now, you say you went with Mr. Carignan to the secondhand store to purchase this gun?

A. Yes.

Q. And where did you go from there?

A. I believe that whenever I started back to the bar, sir, that I lost him.

Q. Well, you didn't see him any more after that, then?

A. Not that I can recall.

Q. Not until next day?

380 A. That is right.

Q. Where did you go after you left the Scandinavian Bar?

A. I went downstairs to the 492 Club, I believe the name of it is, sir.

Q. Did you have some drinks there?

A. Yes, I did.

Q. And where did you go from there, Corporal?

A. The Federal Bar.

Q. Did you have a few drinks there?

A. Yes, sir.

Q. Where did you go from there?

A. I took a cab and came back home.

Q. Do you recall approximately the time you arrived at the Post?

A. After lights out, sir.

Q. What time is lights out?

A. Ten o'clock, sir.

Q. Do you recall the way you entered the barracks that night?

A. Yes, sir; came out of the cab and came in off the street.

Q. Would you say your drinking, your indulging in liquor, was about equal to Mr. Carignan's?

A. I would say yes.

Q. Corporal, you haven't learned, or do you know, of any serious trouble you got in that night, that you have no recollection of?

381 A. I don't.

Q. In your opinion, then, Carignan's condition of drunkenness was about the same as yours, Corporal?

A. Yes, sir.

Mr. COOPER: That is all.

Mr. BUTCHER: Just one moment before the witness leaves. All right. You are excused.

(Witness excused.)

BRAD W. THURMAN. called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

#### Direct Examination.

Mr. COOPER: If the Court please, before examination of this witness I would like to ascertain whether or not the witness has been present in court during the trial of this case.

A. Yes, I have.

Mr. COOPER: We object to any testimony from this witness on the basis that it was the request of the defense that all witnesses be excluded from the courtroom.

By Mr. BUTCHER:

Q. Were you in the courtroom as an observer or did you just step in to see how far the case was progressing, or see if you were needed?

A. I was just in and out.

382 Q. Did you listen to any of the testimony?

A. Some of the prosecution.

Q. Who did you listen to, if you remember?

A. Captain Barkdoll and Marshal Herring.

Q. Did you listen to all of it or fragments?

A. No, sir, just part of them.

Q. How long do you think you were in the courtroom?

A. Not over thirty minutes at a time, at the most.

Q. You were here thirty minutes?

A. Yes.

Q. Did you hear any testimony of any witness who testified as to Mr. Carignan's activities on July 31st, any of the soldiers?

A. No, I didn't, except some that had taken place in town.

Q. You heard some testimony about what took place in town?

A. Yes, sir.

Mr. BUTCHER: Your Honor, this witness is not going to testify as to any activities in town. He is not going to testify to anything that might have been testified to by Captain Barkdoll or Marshal Herring, and he has come down to court on several occasions to look for me and see when he would be needed. He has private employment in addition to his Army service, and has been called away from his work, and I don't believe there was any testimony

383 which would bear upon the testimony that he would give, and I intend to ask no question which would involve any testimony of Captain Barkdoll or Marshal Herring or any of the soldiers who testified. I believe under the circumstances, your Honor, the purpose of the rule being so they would not listen to one person's testimony and be able to testify directly opposite, or similarly—

The COURT: That is the primary purpose of the rule, but you haven't yet indicated to the Court whether the testimony you expect to elicit from him is on a point brought out while he was in the courtroom.

Mr. BUTCHER: There has been no testimony, your Honor, produced in the courtroom as to arrival of Mr. Carignan on the night of July 31st, and that is what I intend to ask him.

The COURT: Very well, you may question him.

Q. Mr. Thurman, will you state your full name?

A. Sergeant Brad W. Thurman.

Q. And you are a soldier assigned to Fort Richardson?

A. Yes, sir; Headquarters, Headquarters Company, United States Army, Alaska.



Mr. COOPER: It goes to the recollection of the defendant in the case.

The COURT: Well, of course his attention may be called to some particular statement if he is unable to remember it but, if he is just hostile and refuses to answer, I don't think there is much you can do about it.

Mr. BUTCHER: May I comment, your Honor, that he is not hostile; he seems to be dumb, but not hostile.

The COURT: (To witness) Will you remember now that your attention has been called to the particular occasion; do you remember the conversation?

A. Not exactly as that. It has been some time ago.

The COURT: Well, you don't have to state it exactly but state it according to your best recollection, just as you remember it now.

A. (Long hesitation.)

The COURT: Can you answer that question?

A. (Long hesitation.) It could have been that but yet I don't know for sure.

412 Mr. COOPER: May I continue with the rest of this and refresh the witness' recollection?

The COURT: You would have to avoid reading anything excepting something that would throw light on the condition of the defendant as to sobriety.

Mr. COOPER: Well, I think to clarify this whole thing, your Honor—

Mr. BUTCHER: May I intercede again and suggest the witness has been asked the question and his very words were, "I do not recall," and then the Court asked if he couldn't remember now what happened, and he answered that question, and even the Court's question, your Honor, was repetitious because he said he could not recall it. I think the question has been answered.

The COURT: Well, but it is obvious from what he said that he means that he cannot recall the exact words and that is the only reason for pursuing this inquiry.

Q. At the same time and at the same place did you not state that, "He couldn't say, for he said he didn't know why he killed her. I asked him if he had her in his car. He said 'No.' He said he met her right where he got ahold of her."

Mr. BUTCHER: Now, your Honor—

Now

Q. did you or did you not—

Mr. BUTCHER: I object—

413 Mr. COOPER: May I finish my question?

Q. Did you or did you not make that statement, words and substance to that effect, in my office on the date in question?

Mr. BUTCHER: Don't answer that now for a moment. Now, your Honor, I object to that as not going into the question of sobriety. Your Honor has limited it to that. That question has nothing in it about that. The question of killing Mrs. Showalter and getting her in a car and all sorts of other things—but nothing going to this point.

The COURT: Well, but the answer of the witness would not have to contain the words drunkenness, intoxication or sobriety if the answer were such that it would negative intoxication or drunkenness. You may answer the question.

A. (Hesitation.)

The COURT: Did you tell the District Attorney that you would be willing to come up and testify to any such conversation?

A. I don't remember I said that; no.

The COURT: Well, do you remember this conversation to which he has called your attention, or are you merely unwilling to testify?

A. No, I am not unwilling to testify, but at the same time I don't want to say something when I would be wrong about it.

414 The COURT: Well, you don't have to say anything if you feel you are going to be wrong about it, but, if you remember it, you have got to answer the question and state it according to your best recollection. Now, we have wasted enough time here now. You will either have to answer or show why you can't.

Mr. COOPER: May I ask one or two questions that might get along with this?

Mr. BUTCHER: Now, if Mr. Cooper is going to ask any more questions, your Honor, I would like him to be instructed not to attempt to produce testimony of what Mr. Carignan said by reading a statement as to other matters besides sobriety.

The COURT: Yes; I think his attention has been directed to it.

Mr. COOPER: I don't intend to do that, your Honor. I want to get at the question of this witness' reluctance.

The COURT: Very well. You may go ahead.

Q. Where do you now reside, Mr. Garner?

A. Federal Jail.

Q. And are you in the same company and in the same general room—

Mr. BUTCHER: Your Honor—

Q. As that occupied by Mr. Carignan?

Mr. BUTCHER: Mr. Cooper is trying to impeach his own witness.

415 Mr. COOPER: I would like to finish my questions before I am interrupted.

Mr. BUTCHER: He is trying to impeach his own witness, which is contrary—

Mr. COOPER: Which I am permitted to do if it is indicated that he is hostile, and counsel should know that.

Mr. BUTCHER: There is no indication of hostility.

The COURT: This is not impeachment. This is merely calling his attention to something that the witness is apparently unwilling to testify to. Go ahead.

Q. Are you all in that same room together?

A. Yes.

Q. Didn't you make a statement to me just today that you were unwilling to come in here and testify if you had to go back in the same quarters with Carignan?

A. Yes; I told him I didn't think it was right to be with somebody and at the same time come over and testify against him, which I don't think is right.

Q. And that is the reason that you are reluctant to testify?

A. No, it is not only that, but I don't remember completely myself.

Q. Is it your testimony now under oath that you have no recollection whatever of giving me this statement in my office in November?

416 Mr. BUTCHER: It is not an oath; he took an affirmation, and it is not an oath.

The COURT: Well, the penalty is the same. The fact that he mentions "oath" is not something to quibble over. Objection overruled.

A. What was that question?

Q. Is it your testimony now under oath or affirmation that you made no statement such as I have just read to you, or words to that effect, in my office during the month of November?

A. Absolutely not.

Q. It is your testimony that you made no such statement? Is that your testimony, Mr. Garner?

A. No.

Q. Oh.

Mr. COOPER: That is all.

The COURT: Well, then as I understand it, you don't want to answer these questions because of the fact that you are confined in the same quarters with the defendant; is that it?

A. No, that isn't it, but, if you don't remember something clearly enough that you can go right through with it, why I don't believe you should say it.

The COURT: Well, it is something—is it rather unusual in nature? Is it something that you would forget in that time?

417 A. Well, I have never thought much about it.

Mr. BUTCHER: Now, your Honor, I wish to ask that all this testimony be stricken, and I wish to take an exception to the ruling of the Court that it be permitted to go as far as it did, and exception to the leading questions asked by the District Attorney and to the inquisition of the Court, your Honor; I except to all of them.

The COURT: Well, the motion to strike everything that was said here by this witness, the questions asked and

answers made, is granted, / the jury are instructed to disregard the entire incident. Are you through with this witness?

M. K. M.

Mr. COOPER: Yes.

The COURT: You are excused.

(Witness excused.)

Mr. COOPER: The Government rests, your Honor.

The COURT: The prosecution may make its opening argument.

WHEREUPON, J. EARL COOPER, United States Attorney, made the opening argument to the jury in behalf of the Government; and thereafter, JAMES WEIR, of attorneys for the defendant, made the opening argument to the jury in behalf of the defendant, and HAROLD BUTCHER, of attorneys for the defendant, made the closing argument to the jury in behalf of the defendant;

418 WHEREUPON, Court recessed for ten minutes, re-convening as per recess, with all parties present as heretofore and the jury all present in the box; whereupon, J. EARL COOPER, United States Attorney, made the closing argument to the jury in behalf of the Government; and

THEREUPON, respective counsel were furnished copies of the Court's Instructions to the Jury, and the Court read his Instructions to the Jury.



The COURT: Are there any exceptions?

Mr. BUTCHER: Exception to No. 7, your Honor.

Whereupon, respective counsel agreed that a sealed verdict may be returned, and the jury was duly instructed regarding the returning of a sealed verdict; the bailiffs were duly sworn to take charge of the jury, and the alternate jurors were excused; whereupon the jury retired to  
o'clock

M. K. M.

the jury room at 4:35 / p. m. in charge of the bailiffs to deliberate upon a verdict; whereupon Court adjourned until 10:00 o'clock a. m., December 15, 1949, reconvening as per adjournment, with all parties present as heretofore and the jury all present in the box; whereupon the following proceedings were had:

The COURT: Ladies and gentlemen of the jury, have you arrived at a verdict?

FOREMAN: We have, your Honor.

The COURT: You may hand it to the bailiff. (To the Clerk) You may read and file the verdict.

WHEREUPON Verdict No. 1 was read by the Clerk, finding the defendant guilty of murder in the first degree as charged in the indictment; and thereupon, at the request of counsel for the defendant, the jury was polled, and each member of the jury answered individually in the affirmative as to his concurrence in the verdict rendered, with no negative answer.

The COURT: The defendant is remanded to the custody of the Marshal.

(END OF RECORD.)

420 Reporter's Certificate to foregoing transcript omitted in printing.

421 United States Court of Appeals for the Ninth Circuit

Before: HEALY, BONE and POPE, Circuit Judges.

*Order of Submission—Oct. 16, 1950*

ORDERED appeal herein argued by Mr. Harold J. Butcher, counsel for appellant, and by Mr. J. Earl Cooper, United States Attorney, counsel for appellee, and submitted to the court for consideration and decision.

422 United States Court of Appeals for the Ninth  
Circuit

Before: HEALY, BONE and POPE, *Circuit Judges.*

*Order Directing Filing of Opinions and Filing and  
Recording of Judgment—Dec. 8, 1950*

ORDERED that the typewritten opinion of Healy, Circuit Judge, and concurring opinion of Bone, Circuit Judge and dissenting opinion of Pope, Circuit Judge, this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion and concurring opinion rendered.

423 In the United States Court of Appeals for the  
Ninth Circuit

HARVEY L. CARIGNAN,

APPELLANT,

vs.

UNITED STATES OF AMERICA,

APPELLEE.

*Opinion—Dec. 8, 1950.*

Appeal from the District Court for the Territory of Alaska,  
Third Division

Before: HEALY, BONE, and POPE, *Circuit Judges*

HEALY, *Circuit Judge*

Appellant was indicted and convicted of murdering one Laura Showalter in the course of an attempt to commit rape upon her. As required by the pertinent Alaska statute,<sup>1</sup> he was sentenced to death.

Numerous grounds for reversal are assigned, four of which, only, are urged. These are (1) that there was error in admitting a confession of appellant, claimed to have been involuntary and wrongfully procured; (2) that the court erred in declining to permit the accused to take the stand and testify, in the absence of the jury, on matters concerning the admissibility of the confession; (3) that the court was in error in denying the accused's motion for removal of the cause on the ground of the existence of local

<sup>1</sup> Sections 65-4-1, Alaska Compiled Laws Annotated, 1949

Mr. COOPER: If the Court please, at this time, then,  
 394 in order to clarify this matter, I would like to request  
 —and I think it is in the Court's discretion—that I  
 continue with my cross examination.

The COURT: It is within the Court's discretion. Go ahead.

Q. Do you know a soldier by the name of Miller?

A. Yes.

Q. Have you talked to any of these soldiers about the case, Mr. Thurman?

A. No, sir, I haven't.

Q. You have had no discussion with them at all about this case?

A. I have remarked to them about Carignan's case; yes.

Q. And what was the nature of your conversation with them about this case?

A. It was merely about the hat.

Q. About the hat?

A. Yes, sir.

Q. And as a matter of fact, didn't you attempt to urge them to come into court here and testify that Carignan was drunk that night?

A. No, I did not, sir.

Q. Did you mention that to them?

A. I mentioned about him being drunk that night.

Q. And as a matter of fact, didn't you attempt to  
 395 get them to agree with you that he was drunk that night?

A. No, sir, I didn't attempt to do so.

Q. And did you also discuss with them something in the nature of what a hard life Mr. Carignan had had?

A. That I wasn't aware of.

Q. I beg your pardon?

A. I wasn't aware of his hard life.

Q. You knew nothing about his past?

A. Except what has come up in this case.

Q. You mean what you have heard in the—

A. What I have heard; outside talk; rumors.

Mr. BUTCHER: Now, your Honor, I dislike so much to make continuous objection, but, your Honor ruled that this witness was permitted after having been present in court, was permitted to take the witness stand, that he confine his testimony to one point. Now, we limited ourselves to that point on your Honor's ruling, and we didn't go beyond its

scope. Now, in this cross examination Mr. Cooper has gone far

M. K. M.

/ beyond the scope, and he is now questioning him about other matters which he heard when he was in the court. Now, I think it is most improper to permit him to do it. It is beyond the scope, and your Honor has already ruled that to go too far beyond the scope of direct examination is improper, in the case of Mr. Weir's examination of Corporal Miller; and I think that ought to be imposed in this case.

396 Mr. COOPER: We have no further questions.

Mr. BUTCHER: We have no further questions.

The COURT: Have you or the men in the barracks ever been questioned in connection with this case during the course of its investigations?

A. I haven't; no, sir. Some of them have, sir.

Mr. BUTCHER: I apologize, your Honor. I have one other question.

#### Re-direct Examination.

By Mr. BUTCHER:

Q. Mr. Thurman, what occasioned you to come to my office to tell me you knew Mr. Carignan was drunk?

A. I came down to see what the possible outcome of his case was.

Q. And did you then voluntarily inform me as to his conditions?

A. Yes, sir.

Q. And did you tell me at that time what you have now told on the witness stand?

A. Yes, sir, I did, sir.

Mr. BUTCHER: That is all.

Mr. COOPER: That is all.

Mr. BUTCHER: Unless, your Honor, we appeal to your Honor to permit a continuance to get the other witnesses, which perhaps can be secured by an order of some  
397 military authority at the Post and which procedure can be done easily and at no expense to the Government, we will be compelled to rest.

The COURT: Well, how much time do you want?

Mr. BUTCHER: Such time as would be necessary to get them. I couldn't issue that order, your Honor. It would have to come from some official source.

The COURT: The Court can't grant you a continuance beyond 2:00 o'clock. Is that going to be sufficient time?



Mr. BUTCHER: I doubt it very much, your Honor. I will have to go out to the Post at 2:00 o'clock and adduce this testimony.

Mr. COOPER: If I may make a suggestion, your Honor, I believe that Mr. Petersen of the C.I.D. is here. Perhaps something could be worked out between Mr. Petersen and Mr. Butcher to obtain the attendance of these soldiers here.

The COURT: Well, the Court will grant you a continuance only until 2:00 o'clock, because there has been no showing made here, and as I intimated yesterday, this Court is too far behind in its work to be extravagant with time, so that you may have until 2:00 o'clock.

WHEREUPON the jury was duly admonished and Court adjourned until 2:00 o'clock p. m., December 14, 1949, reconvening as per adjournment with all parties present as heretofore and the jury all present in the box; where-

398 upon the trial proceeded as follows:

The COURT: You may proceed.

Mr. BUTCHER: The defendant rests, your Honor.

The COURT: Any rebuttal?

Mr. COOPER: Yes, your Honor.

#### GOVERNMENT'S REBUTTAL

RALPH WOFFORD, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

#### Direct Examination.

By Mr. COOPER:

Q. Would you state your name, sir?

A. Ralph Wofford.

Q. And what is your business or occupation?

A. I own a secondhand store.

Q. Where is it located?

A. 427 C Street.

Q. Were you engaged in that business on the 31st day of July, 1949?

A. Yes.

Q. Do you recall an occasion on that evening where you had business with a soldier involving a sale of a gun?

A. I believe I do; yes, sir.

Q. Will you state what you recall about that incident?

399 A. Well, a fellow came in and bought a gun, I believe it was for \$30, or so, and he wasn't gone over three to five minutes, he came back and said that he better sell that back before he got in trouble, so I took the gun back for him. That is all.

Q. Now, can you describe the gun, or recall what it looked like?

A. No, sir, I can't.

Q. Do you recall anything about it at all?

A. It is my impression at this time that it was a small break-open revolver, but I can't remember for sure.

Q. Do you recall anything about the color?

A. It was nickle-plated, I remember that much.

Q. What time do you usually close up your place of business?

A. There was no regular hour; it is usually between seven and nine.

Q. With reference to your closing hour, can you state approximately the time this incident took place?

A. I believe it was around 9:00 o'clock because I stayed open late that night.

Q. Mr. Wofford, the soldier that you have just described as having purchased this gun and then returned it, will you state what your observations were as to whether or not he was drunk?

A. He didn't appear to be drunk when I sold him  
400 the gun. He had been drinking some when he came back with the gun.

Mr. COOPER: Your witness.

#### Cross Examination.

By Mr. BUTCHER:

Q. How carefully did you observe him, Mr. Wofford?

A. We have a card we fill out on all purchases of guns which requires weight, height, description and so forth, and I filled out this card, so I looked the man over pretty good.

Q. Was any time set forth on that card that indicated the time he was in there?

A. Yes, sir.

Q. Do you have that card with you?

A. No, sir. The card was torn up when he brought the gun back.

Q. Do you know, at this time, the time of day or evening that Mr. Carignan was in there?

A. Well, this incident, as I remember, happened around 9:00 o'clock.

Q. What causes you to fix that time at 9:00?

A. It was just a little while before I closed.

Q. Do you recall what day it was?

A. It was on an Army payday, and I believe it was in July.

Q. Were you usually open on Sundays?

401 A. No, sir.

Q. Are you ever open on Sundays?

A. I am at times; yes, sir.

Q. Were you open any Sunday in the month of July that you recall?

A. Not unless the last day fell on Sunday. If the last day of the month falls on Sunday, I am open on Sunday, otherwise I might be down there for thirty minutes or an hour doing work around the shop.

Q. If the last day of the month falls on Sunday, what are your usual hours as to opening and closing?

A. The same as any other day.

Q. Do you recall whether this was a Sunday or not?

A. No, sir, I don't.

Q. But you do recall that you closed at 9:00 o'clock; is that your testimony?

A. It was nine or after.

Q. Yet you don't recall the day?

A. No, I don't recall whether it was Sunday or not.

Mr. BUTCHER: That is all.

#### Re-direct Examination.

By Mr. COOPER:

Q. You do recall it was a soldiers' payday?

A. I recall it was a soldiers' payday; yes, sir.

402 Q. In July?

A. I am sure it was July.

Mr. COOPER: That is all.

(Witness excused.)

Mr. COOPER: I have one more witness, your Honor, but before proceeding with that, while we are waiting for the witness to arrive—and he should be here in just a minute or two—I would like the indulgence of the Court and request the Court to permit me to reopen my case in chief solely for the purpose of introducing a certificate which I have here, and that is the sole purpose.

The COURT: A certificate of what?

Mr. COOPER: A certificate of the death of Mrs. Showalter.

The COURT: You may reopen for that purpose.

Mr. BUTCHER: May I have an objection, your Honor?

The COURT: Yes.

Mr. BUTCHER: I will take an objection.

The COURT: Yes.

Mr. BUTCHER: May I take an exception?

The COURT: Yes.

Mr. COOPER: We, at this time, your Honor, offer this document into evidence.

Mr. BUTCHER: My objection was to the reopening of the case under the circumstances, your Honor, and I may  
403 object to this. Your Honor, I object to the admission of his death certificate into evidence for the reason it certifies to the death of one Laura Showalter. No evidence was produced in this case that the person who died at this park on Ninth and A Street was Laura Showalter, and for that reason this has no probative value as a document in evidence in this case.

The COURT: Objection overruled. It may be admitted.

WHEREUPON the exhibit was marked Plaintiff's Exhibit No. 16.

Mr. BUTCHER: May I ask a question, your Honor?

The COURT: Yes.

Mr. BUTCHER: Mr. Cooper has reopened his case. Now, is he going to close it and go back to his rebuttal on his next witness?

Mr. COOPER: The next witness will be in rebuttal.

The COURT: It is reopened only for the purpose of offering this exhibit, as I understood it, and that is all that the Court granted.

Mr. COOPER: That is correct. I would like to have the matter clarified in view of the fact there was no witness on the stand. This is offered as an official record and it will not be necessary at this time for me to read it to the jury.

The COURT: You don't have to read it, but you may read it if you wish.

404 Mr. COOPER: It is not necessary, your Honor.

The COURT: Very well.

WHEREUPON FRANCIS E. GARNER was called as a witness on behalf of the Government and indicated he would not take the oath.



The COURT: If you don't want to take an oath, you will have to affirm that you will testify truthfully. You may administer an affirmation to him.

WHEREUPON, the Clerk of the Court administered the affirmation to the witness, but the witness did not respond.

The COURT: You may take the stand here.

WHEREUPON, the witness entered the witness box.

Mr. BUTCHER: Your Honor, I would like to make an objection to this procedure at this time. This particular witness testified in the last Carignan case and took the oath and, if he is going to be produced now to testify in rebuttal, then I believe that he ought to take the oath as he did before and, if he doesn't take the oath, there is no manner in which we can hold him to testify to the truth.

The COURT: Why, the same penalties are attached to affirmations as to oaths. You may take the witness stand.

WHEREUPON, the witness took the witness stand.

The COURT: Perhaps you better respond to that affirmation administered to you. Do you affirm that you will so testify?

405 Mr. GARNER: I don't understand how you mean, sir.

The COURT: Well, if you don't want to take an oath, you have to affirm that you will testify truly under the penalties of perjury just as it was read to you.

Mr. COOPER: If the Court please, I might be somewhat helpful in clarifying this situation. I believe it is because—not that the witness has any conscientious scruples against taking an oath, but the fact that he is reluctant to testify in the trial of this case. I think that is it.

Mr. BUTCHER: Then, your Honor, he ought to be informed that he doesn't have to testify if he doesn't want to take an oath.

The COURT: Just the opposite. A person cannot refuse to testify because he doesn't want to take an oath, unless it is against his religious scruples.

Mr. BUTCHER: Your Honor, he can't testify unless he takes the affirmation or the oath.

The COURT: Certainly.

Mr. BUTCHER: And it is my impression that he hasn't done that yet.

The COURT: That is what I am asking him now, if he is willing to take the affirmation. If it is against your religious scruples to take this oath, then you will have to take this affirmation, and it is not within your province to refuse to do one or the other. Are you willing to

406 affirm that you will testify truly in this case under the penalties of perjury?

Mr. GARNER: Yes.

The COURT: Go ahead.

Direct Examination.

By Mr. COOPER:

Q. Would you state your name please?

A. Francis E. Garner.

Q. Are you acquainted with Harvey L. Carignan?

A. Yes.

Q. Calling your attention to approximately the middle of October, 1949, at the Federal Jail, do you recall having a conversation with Harvey Carignan?

Mr. BUTCHER: Now, before the witness answers this question, your Honor, this witness, under my understanding of the rules that we are operating under here, was called for rebuttal purposes. Now, the only testimony offered by the defendant on his behalf was two witnesses who testified as to his state of intoxication and nothing else.

Mr. COOPER: That is right, your Honor.

Mr. BUTCHER: And if this witness is going to be requested to testify as to some other period of time other than the 31st day of July, then it is not proper rebuttal and is not admissible.

407 — Mr. COOPER: The testimony, without stating in substance what the testimony is expected to be, your Honor, is, we feel, appropriate in rebuttal in view of the testimony given by witnesses as to the state of intoxication of the defendant. Now, we feel that by the introduction of testimony here that we can rebut the fact that he was so intoxicated that he had no recollection of what happened that night.

The COURT: Very well. Under that theory you may ask the question. Did you ask it?

M. COOPER: The question was completed, I believe.

Mr. BUTCHER: May I call your Honor's attention to the fact that witness after witness that was produced here by the Government testified that Carignan consumed liquor on that day. They produced that testimony in court. We simply asked our witnesses—Corporal Miller and Corporal Kellner both testified that they consumed liquor on the same day that Carignan was with them. Now, if they consumed liquor, then they were aware of Carignan's state

of intoxication and, if this man is going to testify he was not, then it is directly contrary to the evidence that they have already produced.

The COURT: Well, of course, there is no rule that requires that there be an absolute lack of inconsistency or that there be no inconsistency between the testimony of one witness and another. In all cases there are inconsistencies between the testimony of one witness and of

another or others for the same side, and that cannot be an objection to the testimony merely because some other witness testifies to something else. The examination will be permitted, but it is limited to that one question, shedding light on his condition as to sobriety.

Mr. COOPER: Shall I repeat the question, your Honor?

The COURT: Well, yes, if it wasn't answered.

Mr. COOPER: It hasn't been answered yet.

The COURT: You better repeat it.

Q. Mr. Garner, calling your attention to the middle of October, 1949, at the Federal Jail, I will ask you whether or not you had a conversation with Mr. Carignan relative to the Showalter case?

Mr. BUTCHER: Now, your Honor, that question can't be answered unless he is asked a question about the intoxication. Your Honor limited it strictly.

The COURT: But this is preliminary. I suppose it calls for a yes or no answer. Objection overruled.

A. How was that question again?

Q. I am asking you, if approximately the middle of October, 1949, in the Federal Jail, if you had a conversation with Mr. Carignan concerning the Showalter case?

Mr. BUTCHER: Your Honor, I hesitate to interrupt again but I think the middle of October is too uncertain. It is not too long ago that the date couldn't be remembered if the conversation occurred.

The COURT: It isn't what?

409 Mr. BUTCHER: It isn't too long ago that, if the conversation occurred, he couldn't remember the date. The middle of October is a period of some ten days; it could be; it is flexible enough.

The COURT: If it is as near as he can fix it, it is near enough. Objection overruled.

A. I couldn't say for sure it was that day; no.

Q. Well, do you recall having had a conversation with Mr. Carignan about the Showalter case?

A. Oh, there was a lot of things talked over; yes.

Q. All right. Will you tell us what you recall about that conversation?

A. It has been a long time ago. I don't remember exactly what it was.

Q. Well, to the best of your recollection?

A. (Long hesitation.)

The COURT: You may answer that question.

A. Not for sure, I couldn't; no.

Q. Do you recall anything about the conversation?

Mr. BUTCHER: Now, your Honor, he is inviting something besides the intoxication by saying, "Do you recall anything about it?" Your Honor has ruled it is limited to the question of sobriety.

The COURT: It is still limited to that but, where the witness is either reluctant or unwilling, why, the questions can take a leading form. You may answer that question.

A. I don't know for sure what the conversation was.

Q. Let me refresh your recollection, Mr. Garner. Calling your attention to the month of November in the office of the United States Attorney, in my office, in the presence of: Mr. Jack Jenkins; your attorney; Mr. Olson, my stenographer, Miss Williams; and Mr. Givens, your companion; did you not in words and substance in effect make the following statement: "On or about October 15, 1949, at the Federal Jail in Anchorage, Alaska, a conversation was had with Harvey Carignan. Carignan was over by the window on the west side toward the Westward Hotel. He stopped, talking about one case or another, and started bragging about the different rapes he had committed."

Mr. BUTCHER: Now, your Honor, I object. This is most unfair and prejudicial on the part of the District Attorney.

The COURT: I think that the only part of the statement that you should select is the part that you wish to bring out that would shed light on the condition of the defendant as to sobriety and no more.

Mr. COOPER: I apologize to the Court. I didn't intend to read that particular sentence. It is all embodied here in one paragraph.

411 Q. "I asked if he knew Laura Showalter before that. He said, 'No.' I asked him how come he killed her."

Mr. BUTCHER: Now, your Honor, I object again. The District Attorney is getting into evidence testimony and material by reading it to this witness that the witness couldn't answer on rebuttal if he were asked those questions.



"The Court bases its decision of today on the theory that a 'confession is inadmissible if made during illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the 'confession is the result of torture, physical or psychological \* \* \* \* \*"

and

"but the rule now announced forces exclusion of *all confessions given during [such] illegal restraint*. It will shift the inquiry to the legality of the arrest and restraint, rather than to whether the confession was voluntary. *Such exclusion becomes automatic on proof of detention in violation of the commitment statute, followed by a confession to police officers before commitment.*"

435

and

"It is because illegal detention was not thought to be per se coercive that it was necessary to create the McNabb rule of exclusion. \* \* \* The Court now says that *illegal detention alone* is sufficient to bar from evidence a confession to the police *during that unlawful detention*. \* \* \* Apparently the Court intends to make the rule of commitment 'without unnecessary delay' an iron rule without flexibility to meet the emergencies of conspiracies, search for confederates, or examining into the ramifications of criminality. The Court does this by failing to distinguish between necessary and unnecessary delay in commitment. \* \* \* All, I think, without any need for such action since every coerced confession has been [constitutionally] inadmissible for generations." (Emphasis supplied.)

Measured by this yardstick of what appears to be a most careful and painstaking appraisal I see no other course open to us than to follow the rule and reverse. However, I emphasize that my concurrence rests *solely* upon the fact that appellant was not arraigned prior to being interrogated by the Marshal and prior to the making of the confession. The evidence in this case convinces me that the confession was freely made and was not the product of any form of promises or inducement that would or should vitiate it. I am in complete agreement with Judge Pope's comment that if the *drastic departure* from "previous notions" (as to admissibility of confessions) is to become binding on federal courts, this vital change should be accomplished by Congress and not the courts.

I express a final thought which comes as the outgrowth of years of observation and sufficient experience to justify my misgivings. There is implicit in this case the appalling possibility that a brutal murderer who had reached the maturity of manhood and who fully understood the nature of his horrible crime, may possibly escape punishment because of the suppression of this confession. Even though there is other evidence in the case which tends to connect appellant with the murder and corroborates the truth of his confession,

436 a cautious and careful prosecutor might well conclude that this additional and corroborative evidence, standing alone, would not, in the event of a new trial, be sufficient to establish guilt of murder beyond all reasonable doubt. In such an event the murder charge might be dropped—a far from unusual circumstance in the course of criminal prosecutions. It is because of the possibility of such a culmination that cases like this induce the sense of frustration and futility which now assails so many law abiding people as they contemplate the failure of the law to bring obvious criminals to justice. Oceans of argument and rules of evidence will not explain away such failures at a time when organized and unorganized lawlessness and gangsterism of the most vicious sort constitute a terrifying threat to our entire social order—and what is even more ominous right now, to the peace of the whole world.

*Pope, Circuit Judge, dissenting:*

As I read *Upshaw v. United States*, 335 U. S. 410, I am convinced that it does not require the result here reached, and that what we are about to do is to extend the doctrine of that case beyond its intended or proper boundaries.

The language of the *Upshaw* case, expounding the *McNabb* case, is that the confessions were there rejected because the defendants were questioned "while held in 'plain disregard of the duty enjoined by Congress upon Federal officers' promptly to take them before a judicial officer,'" and that the *McNabb* confessions were "induced by illegal detention". The confessions in the *Mitchell* case were distinguished because made "before any illegal detention had occurred." *Upshaw's* confession was held to have been given while he was "illegally detained for at least thirty hours for the very purpose of securing these challenged confessions." Therefore, it was said, the confessions were "the fruits of wrongdoing by the police."

The plain fact here is that when Carignan gave his confession he was not being held in disregard of any duty on the police officers. There was no "illegal detention". He was being lawfully held after commitment upon a charge of attempted rape. The confession was not "the fruit of wrongdoing" by anyone.

437 Yet this confession which the majority of us are agreed was entirely voluntary, and given by Carignan when he was not only under neither physical nor psychological pressure, but in fact being treated with kindly consideration may never be used as evidence because of the argument that had Carignan been brought before a magistrate upon a new charge, and then for a second time being informed of his right to retain counsel, he might then have asked for counsel when charged with this, more serious, offense. The questioning officer is criticised for the "faintness" of his warning that Carignan was entitled to counsel. It is said that upon a second commitment, the magistrate's reiteration of his right to counsel would have given him more emphatic warning of this right.

Now if it be conceded, as is done by Judge Healy, that a prisoner lawfully in confinement is not immune to gentle questioning, this whole thing comes pretty close to holding that a confession cannot be taken in the absence of the accused's lawyer.

It is not too easy to think clearly on these matters when dealing with the case of one sentenced to death. But if we move from this agitated field of homicide to the comparatively quiet area of, say, robbery, we can more calmly survey the problem, which, after all, is no more than a search for a means to ascertainment of the truth. Assume a case in which the police have been confronted with a dozen hold-ups of branch stores, where the circumstances disclose similarities in the manner of commission of these crimes. The police discover probable cause for charging the accused with one of the robberies, and he is so charged, bound over and committed. While thus being held, the accused makes a statement admitting commission of all the others.

The officer gave Carignan a pad and pencil and permitted him to write what he had to say, in his cell. The officer was not present when the writing was done. After it was composed the prisoner was told that if he wished he could "tear it up and flush it down the toilet." There was no continued or continuous questioning. When Carignan asked for a priest, on two occasions, his wish was promptly granted.

Certainly my associates would not say that the statement would be inadmissible because of the want of eleven more commitments, as such. What I understand them to  
 438 be saying is that the commitments are required in order to bring home to the accused, eleven more times, his right to counsel. What I think they have done is to make a new rule relating to confessions. They have, in effect, lifted out of context the requirement that an accused, upon trial, shall "have the assistance of counsel for his defense", unless "there is an intelligent and competent waiver [of his right to counsel] by the accused." *Johnson v. Zerbst*, 304 U. S. 438. I think that until now it has never been held that such a requirement be a prerequisite to the admissibility of a confession. As a practical matter, this would do much to dry up confessions as a means of getting at the facts in criminal cases, for as we know, "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."<sup>2</sup> I think if there is to be any such drastic departure from previous notions as to the law, it should be accomplished by Congress, rather than by the courts.

I think we are all agreed that the continued and growing insistence of the courts upon strict adherence to the rules established for the protection of defendants accused of crime has had a salutary effect upon the administration of justice. For one thing, it has required more careful and thorough preparation and presentation of their cases by prosecutors, and the decisions relating to confessions have put the police on their toes to procure other evidence and to rely less upon the easier process of exacting confessions.

But where a confession "rings true", as does this one, where in all the circumstances of its giving there is no single thing which suggests that it might be untrustworthy, the prosecutor, as the representative of the public interest, is entitled to have the confession before the jury, and the court cannot shirk its share of duty in the search for truth by rejecting it where no reason for distrust exists.

439 The only sound reason for excluding certain confessions is that stated by Chief Justice Shaw in *Commonwealth v. Morey*, 1 Gray, 462, as follows: "The ground

<sup>2</sup> Mr. Justice Jackson, concurring in result, in *Watts v. Indiana*, 338 U. S. 49, at p. 59. The statement quoted in the opinion from the dissent of Mr. Justice Reed in the *Upshaw* case, is no more than an expression of the same idea. I am unable to see how this extract from the dissenting opinion aids this court's construction of the majority opinion in *Upshaw*.



on which confessions made by a party accused, under promises of favor or threats of injury, are excluded as incompetent is, not because any wrong is done to the accused in using them, but because he may be induced, by the pressure of hope or fear, to admit facts unfavorable to him without regard to their truth, in order to obtain the promised relief or avoid the threatened danger, and therefore admissions so obtained have no just and legitimate tendency to prove the facts admitted."

Hence confessions obtained by the "third degree", by prolonged and exhausting interrogations, by various forms of psychological pressure, are suspect, for as Mr. Wigmore says, (§ 822) it may be that "the untrue acknowledgment of guilt is at the time the more promising of two alternatives." The same may be true where the confession is made "during illegal detention", especially where such detention was "for the very purpose of securing [the] challenged confessions."

The logic of these rules, cannot, in my opinion, be extended to this case. That no attorney attended Carignan's confession, or that the officer did not more emphatically bring the hiring of an attorney to his attention does not throw doubt upon the confession or suggest any reason for suspecting an untrue acknowledgment of guilt.

One who deprives a litigant of the testimony of a witness by threats or intimidations such that the witness refuses to testify, is guilty of an offense under Title 18, § 1503, relating to "Obstruction of Justice". I think that before we say that the United States may never use this confession as evidence we should take great care lest, for too unsubstantial reasons, we also obstruct justice, not only in this, but in other cases to follow.

(Endorsed:) Opinion, Concurring Opinion and Dissenting Opinion. Filed Dec. 8, 1950. Paul P. O'Brien, Clerk.

440

United States Court of Appeals  
For the Ninth Circuit

No. 12517.

HARVEY L. CARIGNAN,  
APPELLANT,

VS.

THE UNITED STATES OF AMERICA,  
APPELLEE.

*Judgment—December 8, 1950*

Appeal from the District Court for the Territory of Alaska, Third Division.

This cause came on to be heard on the Transcript of Record from the District Court for the Territory of Alaska, Third Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, and that this cause be, and hereby is remanded to the said District Court for further proceedings.

(ENDORSED) Judgment  
Filed and entered December 8, 1950  
PAUL P. O'BRIEN, Clerk.

441 Clerk's Certificate to foregoing transcript  
omitted in printing.

442 Supreme Court of the United States  
No. ...., October Term, 1950.

*Order Extending Time to File Petition for  
Writ of Certiorari*

UPON CONSIDERATION of the application of counsel for petitioner( ),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 6, 1951.

WM. O. DOYLE *Douglas*  
Associate Justice of the Supreme  
Court of the United States

Dated this 3rd day of January, 1951.

passion and prejudice rendering a fair trial impossible; and (4) that the verdict is not supported by the evidence in that there was no proof that the homicide occurred in the course of an attempted rape.

424- Following is a summary of the development of the case as shown by witnesses for the government. About nine o'clock on the evening of July 31, 1949, one Keith, while walking toward his home in the city of Anchorage, observed a man and woman lying in the grass in a small park. He stepped over toward them, whereupon the man raised up and told him to move on. About six o'clock the following morning, while on his way downtown, Keith examined the area where the incident of the previous evening had occurred, and discovered a dead woman in a semi-nude condition lying in the grass. He at once reported the matter to the police.

On September 14 following, in Anchorage, an unknown person assaulted and attempted to rape one Christine Norton. A similarity in the circumstances suggested the likelihood that this and the earlier crime had been committed by the same person. On Friday, September 16, appellant (who will hereafter be referred to as Carignan) was brought to the police station and placed in a lineup with several other suspects, and the Norton woman identified him as her assailant. On that day the witness Keith, also, was summoned by the police and at least tentatively identified Carignan in a lineup as the man he had seen lying with the woman in the park. Carignan was at once arrested on the charge of assault to rape Christine Norton, was taken before a magistrate, advised of his rights, and apparently given a preliminary hearing on the charge. Thereafter, being held to answer, he remained in custody in the city jail. No complaint was lodged against him in respect of the Showalter murder, and he was at no time taken before a magistrate for examination or commitment on that charge. The police questioned him, however, in an endeavor to obtain a statement implicating him in the death of Mrs. Showalter.

Being unable to get any information from him, the police on Saturday morning, September 17, took him to the office of United States Marshal Herring. We here summarize the latter's testimony in respect of his inquisition, as given before the jury. Herring questioned Carignan about the occurrence of July 31, and the latter asked to see a priest.

After about an hour's conference with the priest Carignan was again asked whether he cared to make a statement and replied that he did. The Marshal gave him 425 a pad of paper and some pencils, and he was placed alone in a cell in the city jail where he was left to himself over Sunday, the Marshal merely calling on him that day to see how he was getting along. On Monday morning he was again brought to the office of the Marshal where the latter asked him if he had prepared a statement. He replied that he had but would like to see the priest again before turning it over. The priest was called and remained with Carignan about an hour.

Afterwards Carignan handed the Marshal the writing he had prepared, but this writing covered only the events of the day and early evening of July 31st, pertaining for the most part to a prolonged drinking bout in which Carignan had engaged with some companions. It made no mention of the subject in which the Marshal was interested. Carignan said he was afraid to say more for fear that he wouldn't be believed and for fear that "his neck would stretch." After further conversation between the two he was prevailed upon to continue the narrative, and he accordingly added an account of his being with and having violently beaten with his fists the woman in the park. When he handed the completed statement to the Marshal he was told by the latter that he could still destroy it if he wished. Altogether, the whole or the major portions of the Saturday and Monday were consumed in the interchanges described.

Carignan appears to have received kindly treatment throughout the period so far as concerned his bodily needs. Herring testified that he made no promises in the course of his efforts to extract the confession. He did, however, tell Carignan that there had been no hangings in the Anchorage judicial division in 27 years. There was also some conversation between the two about conditions at McNeil Island and the Marshal informed Carignan of the facilities afforded the inmates there of learning a trade. In the course of the several interviews the Marshal told Carignan of his own unhappy childhood in an orphan's home and likened his early experience with that of Carignan, who had been for a long time a juvenile inmate of an industrial school in the States. It appears, further, that the Marshal had on the walls of his office a number of religious pictures,



of saints and the like, including one of Jesus. These are said to have been collections made by the officer from  
 426 the old Orthodox churches of the days of the Russian occupation. The Marshal showed them to Carignan, asked him to look into the eyes of the pictured Christ, and in effect suggested to him the advisability of his setting himself right with his Maker by confessing the truth concerning his misdoing.

At the trial the confession was received over objection of counsel appointed by the court to conduct Carignan's defense. Counsel here contends that it was inadmissible under the standards set in *McNabb v. United States*, 318 U. S. 332, and subsequent decisions relating to the admissibility of confessions. He further complains of a violation of Rule 5(a) and (b) of the Federal Rules of Criminal Procedure,<sup>2</sup> and contends that the failure to comply with the rule rendered the confession inadmissible.

Government counsel insists that the rule has no application to the circumstances of the case. He points to the concession of the appellant that upon the latter's arrest in the Norton matter he was at once taken before a magistrate and was advised of the nature of the charge against him, of his right to counsel, and kindred rights. He argues that Carignan was at no time during the period in question under any restraint concerning the death of Mrs. Showalter, that he was not arrested or being held in connection with the murder, hence there was no necessity for following the procedure prescribed by the Rule. It is urged that since the  
 427 crime of assault with intent to commit rape is a bailable offense, the accused upon being committed was free to go at any time he might furnish bail.

<sup>2</sup>"(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

(b) Statement by the Commissioner. The Commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules." Rule 5, 18-USC.

The decisions teach that cases of this type do not yield to uniform treatment, but that each is to be considered in its own setting and in light of its peculiar circumstances. The mere fact that a confession was made by a person while in the custody of the police does not render it inadmissible. And we assume also, however debatable the point, that where an individual is simultaneously suspected of two crimes and has been arrested and regularly taken before a magistrate and committed in respect of one of them, he is not, while so confined, necessarily immune from questioning on the other absent a repetition of the procedure outlined by the Rule.<sup>3</sup> The basic question we take to be whether, considering all circumstances, the historic safeguards that a civilized society accords the individual were here substantially satisfied. On these preliminary assumptions we turn again to the facts.

Appellant was 22 years of age at the time of his trial. He had been inducted into the Army direct from the juvenile detention school where he appears to have spent most of his boyhood, and had ultimately wound up at a military post near Anchorage where he was serving at the time of his arrest. He had no lawyer. Presumably he had not felt the need of one on the occasion of his being taken before the magistrate on the assault charge. But when the Marshal took him in hand he was confronted with a situation of a totally different color. He faced then a posture of affairs in which life itself was at stake, and the need of safeguards, more especially of legal counsel, was correspondingly great.

It is plain from a study of the record that the Marshal succeeded to an extraordinary degree in winning the confidence and influencing the conduct of this wretched boy. The ascendancy of the officer was such that he was entitled to take nothing for granted. Having established himself as it were in the role of father confessor, he was obliged as well to be punctilious in discharging his earthly duty as an officer of the law. We think, as judged by standards

428 now prevailing, he failed in the latter respect. The Marshal says that when Carignan was first brought to his office he "warned him of his rights." The following extract from the record indicates the faintness of the warning in light of what was thereafter to ensue:

<sup>3</sup> Compare McNabb case on its second trial, *McNabb v. United States*, 142 F. 2d 904.

“Q. In what manner did you warn him of his rights? What did you tell him?”

A. I told him he did not have to make a statement at this time, that anything he said could be used against him, and that he was entitled to counsel if he so desired.

Q. Did he discuss with you the question of getting counsel at that time?

A. No, sir, he did not.

Q. Did you ever discuss with him the question of getting counsel?

A. No, sir.”

Considering all the circumstances, including the youth and inexperience of the subject, we think this was not enough. The occasion ultimately arose in the course of this suction process when the need for more became plainly obvious. We refer to the Monday when Carignan handed to the Marshal his innocuous writing and expressed the fear that if he said more “his neck would stretch.” Humanly speaking, what the occasion called for was the suggestion that it would be well for the young man to call in a lawyer and obtain advice before taking any irrevocable step. No suggestion of the sort was forthcoming. Instead, apparently, the suspect’s inquisitor told him that “in the time I had been in this division for 27 years there had been no hangings.” Nobody knew better than the Marshal that if Carignan were to consult a lawyer at that juncture he would infallibly be advised to keep his mouth shut and make no statement of any kind. Thus the purpose of the officer forbade even the mention of the subject of counsel, whereas a duly constituted magistrate with no inquisitorial axe to grind, mindful of the youth and inexperience of the subject and the extreme gravity of the charge, could be expected to perform his functions fully and fairly. Moreover the opportunity to read, or hear read, a formal complaint charging murder in an attempt to rape would put the accused on notice that hanging was mandatory in the event of a verdict of guilty.

429 What the court has to decide is whether the circumstances outlined were such as to bring the case within the spirit and intent of Rule 5 and the holding of the *McNabb* decision, *supra*, as further expounded in *Upshaw v. United States*, 335 U. S. 410.<sup>4</sup>

<sup>4</sup> In the view of the writer of this opinion something approaching psychological pressure, not unmingled with deceit, contributed to the extraction of the confession. Since the majority are of a contrary opinion this possible aspect has not been given weight in the decision to reverse.

It can not fairly be said that the confession here obtained did not involve "use by the Government of the fruits of wrongdoing by its officers." *Upshaw v. United States*, supra, pp. 443, 414. It was not impracticable to arraign Carignan before a magistrate on the murder charge of which he was more than suspected, and there was abundant time and opportunity to do that. Nor, keeping in mind the totality of the circumstances, can one say that such procedure, plus the filing of the formal complaint made mandatory by the rule, would have proved a mere idle ceremony. Significantly, Mr. Justice Reed, who was the sole dissenter in the *McNabb* case, and who along with three other Justices dissented in *Upshaw v. United States*, commented in the latter dissent (p. 424) on the special advantage to the inexperienced of such a hearing, saying: "It must be admitted that a prompt hearing gives an accused an opportunity to obtain a lawyer; to secure from him advice as to maintaining an absolute silence to all questions, no matter how apparently innocuous; . . . and that these privileges are more valuable to the illiterate and inexperienced than to the educated and well-briefed accused."

We hold, therefore, that the court was in error in admitting the confession and the oral statements of the accused which came as its aftermath. It is clear that without it there might well have been no conviction or that the verdict might have been of murder in a lesser degree.

Since a new trial may be ordered in the discretion of the court it will be well to notice briefly the remaining points argued. The granting or denial of the motion for removal of the cause was a matter within the judgment and discretion of the court and we can not say that the discretion was abused. There was sufficient evidence to support a  
430 finding that Mrs. Showalter was murdered in the course of an attempt to rape her. As for the remaining point urged there is no occasion now to rule upon it.

The judgment is reversed and the cause remanded for further proceedings.

*BONE, Circuit Judge, Concurring in result.*

Despite my personal conviction that simple justice in this case would be served by affirmance of the judgment, I feel obliged, for reasons noted below, to agree with the final holding announced by Judge Healy in which the judgment is reversed.

The prevailing opinion outlines the general fact situation revealed by the record and most of these matters require no



further comment. Unless I wholly misunderstand the import and teachings of the Upshaw decision, 335 U. S. 410, application of the rule it announces requires our disposition of this case on this appeal. Before proceeding to a discussion of the Upshaw case certain vital aspects of the instant case deserve emphasis.

As our opinion points out appellant was questioned about his rape of Christine Norton after being picked up on that charge. While being questioned regarding that offense (upon which he was later convicted) appellant was incidentally questioned about the Showalter murder then under investigation but he gave the officers no information about the Showalter matter. It is obvious that up to this time he had said nothing which was, or could be, used against him. A short time later, and in the office of the United States Marshal, occurred the questioning regarding Laura Showalter with which we are here concerned. As respects this questioning, Judge Healy makes plain that at all times when it was under way the officers concerned treated appellant in a restrained and kindly way. In this posture of the facts I think the confession he made of the Marshal escapes the taint of a *constitutional* infirmity.

I think that sound reasons underlie the foregoing conclusion. While I am in agreement with our final disposition of the case, I cannot concede that the record justifies the conclusion (or even a strong inference) that the confession was made because appellant was badgered, over-  
431 reached, coerced or intimidated to a point where a confession was literally wrung from him by unfair methods. I consider his confession to be the product of free will—as much cold and deliberate free will as the impulse that sent him on the pathway of vicious criminality revealed by this sordid record. In my view this man knew at each stage of all the proceedings here involved, exactly what he was doing, and why.

The record shows that at or about the time he was previously questioned concerning the Norton rape he was then fully advised as to *all* of his legal rights in connection with an inquiry concerning his connection with a crime. It would literally rape Reason and stand Logic on her head to assume that with this explicit advice as to all of his rights in such a matter still ringing in his ears, appellant failed to understand, fully and completely, that these same rights were his freely to invoke when almost immediately afterward he was questioned by the United States Marshal in a similar in-

quiry concerning a much more serious offense—his possible connection with the murder of Laura Showalter. I think that the Marshal's statement to him served to again emphasize his right to remain silent if he chose so to do.

We would be utterly naive if we overlooked the cold, hard fact that we are not here dealing with a simple childlike mentality. We deal with a cold-blooded rapist who was clever and cunning enough to hide his criminal trail with great skill. He did not require the services of an attorney to know that he did not have to "talk"—the record shows that he was advised at the Norton inquiry and fully understood that he could remain silent from the moment of his apprehension and detention on a criminal charge to the very end of the legal trail. His age and the extent of his literacy justifies the most careful appraisal of his understanding of the issues confronting him in the later Showalter matter. It will not do to rake and scrape through the whole gamut of possibilities to find some plausible reason to believe that he was a dull clod rather than a pretty smart criminal. That he did not know at all pertinent times that he could remain silent as to Laura Showalter is a conclusion wholly unjustified by the record.

432 There is in this case another impressive fact which lends imposing strength to the view that the confession made to the Marshal was purely and wholly voluntary. Appellant was obviously deeply moved at that time by some form of remorse which induced him to demand the advice of a priest. Perhaps he felt an impulse to change his mind about silence and wanted to discuss this matter with a churchman before reaching a final decision regarding a confession. How can any court or any judge weigh such a consideration with the slightest hope of reaching a just or logical conclusion? It is certain that we should not substitute judicial guesses for what this spiritual adviser may have urged appellant to do. If appellant was urged by the priest to make a clean breast of the whole affair (if he was actually guilty) this contemplation does to the very heart of the problem of the voluntary or involuntary nature of the confession made after the conferences. That this aspect of the matter was being weighed by appellant is given further emphasis by the fact that the priest came back a second time at the request of appellant.

If, as a final result of the two conferences with the priest there arose in appellant's mind a prevailing and overwhelming sense of guilt over having brutally murdered an aged and inoffensive woman, we are justified in the

assumption that the resulting confession was probably the product of this sense of guilt. No one will contend that a detainee was not entitled to have (and to act upon) the *advice* of a man of the church—if this is a *right*, how is any court to determine with any hope of accuracy that the prisoner did not elect to act on the advice that was given?<sup>1</sup> It is of the utmost significance that the confession came shortly after the visits of the priest, a circumstance not to be casually brushed aside. The timing of the confession is a factor which convinces me that the two conferences were infinitely more persuasive in inducing appellant to “tell the truth” than merely gazing at religious pictures and hearing the Marshal tell him that he ought to tell the truth. I am unwilling to casually set aside all consideration of the possible and probable effect of the priestly visits as a matter of no consequence and furthermore, I am unwilling to agree that it violated the rights of appellant for the Marshal to urge him to “tell the truth.”

433 It seems too clear for argument that under any conceivable theory of American law appellant had an *absolute* right to make a *voluntary* confession at *any time*. Surely it will not be seriously argued that courts may, by some judicial ipse dixit, *deny* to any person detained by officials for questioning, this absolute right voluntarily to confess to the commission of a crime regardless of whether the confession comes before or after arraignment. (In this case appellant was not arraigned.) Nor can it be said that denial of a right *voluntarily* to confess at *any time* may be spelled out of any proper, or even strained, construction of Rule 5(a) (b) of the Rules of Crim. Proc.

#### THE UPSHAW DOCTRINE

But regardless of what has been said before it seems clear that the issue we face may not be disposed of on the basis of the voluntary or involuntary character of the confession. Judge Healy's opinion permits the assumption that even though the confession was absolutely voluntary, nonetheless, under (required) strict application of the rule announced in Upshaw, the failure of the officers to have Carignan arraigned within the period indicated in Rule 5(a) (b) *before quizzing him in any manner* about his possible connection with the murder of Laura Showalter, *automatically* requires reversal of the judgment of conviction.

<sup>1</sup> I presume that courts will not challenge the legal right of a churchman to offer advice which might induce a confession.

Because under the facts of this case I fear that this reversal will bring about a grave miscarriage of justice, I have indicated my view about the nature of the confession.

As I read the *Upshaw* decision it seems clear that (as applied to the facts of this case) admissibility of appellant's confession turns upon its *timing* and not upon either its truth or voluntary character, or, upon *both* truth and voluntary character. In such a case it is apparent that even if the confession was as true as Holy Writ and absolutely free from the taint of any form of coercion, it must be rejected as evidence because it was secured (or accepted) *prior to arraignment*. This being my understanding of the rule of evidence laid down in *Upshaw* I feel obliged to agree with Judge Healy in reversing the judgment.

Before commenting further on the *Upshaw* doctrine I emphasize the fact that in this case we face a situation where, in trying to locate and apprehend a rape fiend  
434 and promptly end his murderous career which was terrorizing an entire community and brutally depriving innocent and law-abiding people of *their* legal and constitutional rights by his criminal assaults, the local officers involved were discharging the highest legal and moral duty to protect decent citizens who had hired them for that very purpose. These citizens had every legal right to demand complete fidelity to that duty on the part of their public servants, a fact which is brought home to police officers with unstinted vigor when the lives and safety of citizens are at stake. Considering the great urgency of the situation where prompt action was vitally necessary and delay in capturing appellant and bringing about the end of his criminal activities might surely mean other murders, I think that the officers here concerned discharged their duty to the public with admirable restraint and with a full sense of their obligations to society. I refuse to chalk up to their discredit their very sensible recognition of the fact that *the law abiding also have rights* which the law must protect if it hopes to retain the respect and confidence of decent people—the kind of people upon whose moral and civic standards the nation must rely if it is to endure.

In laying the teachings of the *Upshaw* decision alongside the facts before us, and in appraising its ultimate holding, I feel justified in accepting the conclusions as to its exact meaning which were expressed by Mr. Justice Reed who spoke for four dissenting members of the Court. I quote pertinent statements in the dissenting opinion:



## Supreme Court of the United States

October Term, 1950

No. 530

THE UNITED STATES OF AMERICA, PETITIONER  
VS.

HARVEY L. CARIGNAN

*Order allowing certiorari*

Filed May 21, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CHARLES CLYDE COOPER

**In the Supreme Court of the United States**

OCTOBER TERM, 1950 51

UNITED STATES OF AMERICA, PETITIONER

v.

HARVEY L. CARIGNAN

PETITION FOR A WRIT OF CERTIORARI TO THE  
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# In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 530

UNITED STATES OF AMERICA, PETITIONER

v.

HARVEY L. CARIGNAN

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit reversing respondent's conviction of murder in an attempt to commit rape.

## OPINIONS BELOW

The opinions in the Court of Appeals (R. 283-298) are not yet reported.

## JURISDICTION

The judgment of the Court of Appeals was entered December 8, 1950 (R. 299). On January 3,



1951, the time within which to file this petition for a writ of certiorari was extended by order of Mr. Justice Douglas to and including February 6, 1951 (R. 299). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

#### QUESTION PRESENTED

Whether respondent's written and oral admissions that he assaulted the deceased, which he made voluntarily while being lawfully detained after having been duly arraigned and committed on another charge (i.e., assault with intent to rape another woman); were inadmissible under the rule of *McNabb v. United States*, 318 U.S. 332, merely because at the time of such admissions he had not been arraigned on the murder charge.

#### STATUTES AND RULE INVOLVED

Alaska Compiled Laws Annotated, 1949:

Sec. 65-4-1. *First degree murder*. That whoever, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate, any rape, arson, robbery, or burglary, kills another, is guilty of murder in the first degree, and shall suffer death.

Sec. 65-4-2. \* \* \* That in all cases where the accused is found guilty of the crime of murder under this and the next preceding section, the jury may qualify their verdict by ad-

ding thereto "without capital punishment"; and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life.

Rule 5, Federal Rules of Criminal Procedure:

(a) *Appearance Before the Commissioner.*

An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) *Statement by the Commissioner.* The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

STATEMENT

Respondent was charged in the District Court for the Territory of Alaska, Third Division, with

killing Laura A. Showalter in attempting to rape her (R. 1) and upon his conviction, the jury having returned an unqualified verdict (R. 29-30, 282); he was sentenced to death (R. 32-34).

The evidence showed that at about nine o'clock on the evening of July 31, 1949, in Anchorage, Alaska, one Keith, while on his way home, noticed a man and a woman lying in tall grass at the side of the road. As Keith passed by, while the woman lay motionless, the man arose and ordered him to go on. (R. 117-118, 125, 127.) His suspicions aroused, upon passing this location the next morning, Keith discovered the body of a semi-nude woman and informed the police (R. 120, 129). Upon investigation, the police learned that the victim was Mrs. Showalter and that a number of the personal effects found near the body were hers (R. 143, 155-156, 159, 169). A hat discovered at the scene was later identified as identical with one worn by respondent on the night of the murder (R. 133, 136, 205, 207).

On the morning of Friday, September 16, 1949, the Anchorage police called George Peterson, an agent of the Criminal Investigation Division, United States Army, at Fort Richardson, near Anchorage (R. 185), and advised him that they wanted to speak to respondent and another soldier stationed at the fort. Respondent accompanied Peterson to the Anchorage police station, arriving there about 11:00 a.m. He was placed in a line-up with four other men and was identified by Mrs.

Christine Norton, who was the victim of an assault on the night of September 14. (R. 186, 195.) After questioning as to his activities that night, respondent "confessed to the assault on Mrs. Norton" (R. 195; see also R. 176-177).

While awaiting an answer to Peterson's call to the Staff Judge Advocate at Fort Richardson to find out whether respondent could be released to the civilian authorities for prosecution on the Norton assault charge (R. 195), respondent was questioned briefly concerning the Showalter murder, but he denied that he knew anything about it (R. 159-160, 170-171). About noon Keith was brought to the police station (R. 160-161) and he identified respondent in a line-up<sup>1</sup> as resembling the man he saw lying in the grass with a woman on the night of July 31 (R. 120, 130). Respondent refused to tell the police anything about his activities on July 31, but asked to talk to Peterson alone (R. 195-196). He asked Peterson what he should do and whether Peterson could help him. Peterson told him that he could not be compelled to make a statement, and that he, Peterson, "had nothing to go on, and if he wanted my help he had to give me a story of what his activities were". (R. 192; see also R. 187, 195-196.) Respondent then told Peterson of some of his activities on July 31 and described the clothes he wore that day (R. 187, 191-192).

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<sup>1</sup> It is not clear from the record whether this was the same line-up Mrs. Norton viewed.



During all this period, respondent was not under arrest (R. 174-176, 186, 193). After the interrogation he was asked to wait in the lobby of the police station. Two or three hours later, at approximately 4:00 p.m. on September 16, a United States Deputy Marshal appeared with a warrant for his arrest on the Norton assault charge. (R. 174, 175, 176.) He was immediately arraigned before the Commissioner on that charge (R. 174, 232), advised of his constitutional rights, and committed (R. 44). He was detained in the city jail in the police station because there was no room for him in the Marshal's jail (R. 175).

The next morning, Saturday, September 17, the local police advised Herring, the United States Marshal, of respondent's arrest and the similarity of the attacks upon Mrs. Showalter and Mrs. Norton, and it was decided that Herring should question respondent "in an endeavor to get a statement from him as to whether or not he had anything to do with the Showalter case" (R. 223). About noon Herring took respondent from the jail, treated him to lunch at a restaurant, and then took him to Herring's office in the courthouse (R. 224-225). At the outset, Herring told respondent "he did not have to make a statement at this time, that anything he said could be used against him, and that he was entitled to counsel if he so desired" (R. 224). After telling Herring about his background, respondent "expressed a fear of his neck stretch-

ing" if he made a statement. Herring told him that "it was something I couldn't tell him, promise him, one way or the other as to what was going to happen to his neck, that it was entirely a matter for the jury." (R. 225.) Respondent asked to see a priest, and Herring found one after an hour's hunt. After talking to the priest alone for about an hour, respondent told Herring he would give him a statement. Herring furnished respondent with paper and pencils and returned him to the city jail, leaving instructions that he was not to be disturbed. (R. 220, 225-227.) When Herring left respondent, the former told him "that after he had written the statement, if he did not care to give it to me he could tear it up and flush it down the toilet" (R. 220).

The next day, Sunday, Herring visited respondent briefly at the jail "to see how he was getting along, to see if he needed any cigarettes," but did not question him (R. 227-228).

Monday morning, September 19, Herring took respondent to the grand jury room in the courthouse, and asked respondent if he had a statement he wished to give him. Respondent said he had a statement, but that he wished to see the priest first. He again talked to the priest alone for about an hour, and then gave Herring the statement he had prepared, adding, however, that there was "nothing in it." (R. 220, 228-229.) At that time the statement recounted respondent's activities on July 31 only until he left a bar at about 9:00 p.m.

Respondent told Herring he was "afraid to put the rest of it down for fear that he wouldn't be believed, and for fear that his neck would stretch." (R. 220-221.) After five or ten minutes' further conversation with Herring, respondent completed the statement (R. 221), admitting that after he left the bar he accosted a woman on the street and hit her in the face and that, although he was drunk at the time, he remembered "sitting and hitting a woman in the face with my fists" (R. 235). Herring told respondent that he "could still destroy [the statement] if he wished" (R. 221). Herring testified further that no promises of any kind were made to respondent and that he was never threatened, but, on the contrary, "was treated with the utmost courtesy at all times, as if a guest in my own home" (*ibid.*).

When the prosecution offered respondent's written statement in evidence, respondent's counsel requested and was granted permission to cross-examine Herring before the jury "to determine [its] admissibility" (R. 221-222). In the course of this examination, Herring stated that when respondent expressed fear "that his neck would stretch, \* \* \* I told him that I could not promise him anything, and I told him in the time I had been in this division for twenty-seven years that there had been no hanging, what would happen to him I couldn't promise him or anyone else" (R. 230). Herring had pictures of Christ and various saints on the walls of his

office. He said that in his talk with respondent in the office he showed him the picture of Christ, and asked "what he thought his Maker would think about him" and suggested "that his Maker might think more of him if he told the truth about this" (R. 230-231). He also said that respondent asked him what kind of a place McNeil Island Penitentiary was, and that he told respondent he "had known men that had been there and learned a trade and that made something of their lives, and it may be that I told him of one specific instance of a man that learned a boat-building trade there" (R. 231).

Following this cross-examination, the court overruled respondent's objection to the admission of his statement on the ground that it was the result of promises and inducements, and it was read to the jury (R. 232-235).<sup>2</sup> Thereafter, Herring testified that immediately after respondent had given him the written statement on September 19, respondent demonstrated how he had held Mrs. Showalter, identified a picture of Mrs. Showalter as resembling the woman he attacked on July 31 (R. 250-251), identified as his the man's hat found at the scene of

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<sup>2</sup> Prior to the admission of the statement, respondent's counsel also requested that the jury be excused and that respondent be allowed to testify "on the taking of this statement." The court denied the motion, stating that it had "heard enough evidence on this matter." (R. 232.) The denial of this request was assigned as error on respondent's appeal (R. 283), but in view of the Court of Appeals' holding that respondent's admissions were erroneously admitted in evidence, it thought there was "no occasion now to rule upon" this assignment (R. 289).



the crime (R. 235), described the clothes he wore at that time, and went with Herring and other officers to the scene and pointed out to them the place he attacked Mrs. Showalter and the route he took back to the fort (R. 236-237; see also R. 161-162, 179, 183-184).

The Court of Appeals, one judge dissenting, reversed respondent's conviction on the ground that his written and oral admissions were inadmissible under the rule of *McNabb v. United States*, 318 U.S. 332.

Although Judge Healy, one of the majority, thought that "something approaching psychological pressure, not unmingled with deceit, contributed to the extraction of the confession" (R. 288, fn.), Judge Bone, concurring, and Judge Pope, dissenting, agreed that respondent's admissions were entirely voluntary (R. 290-292, 294, 296), with the result that Judge Healy's view in this regard was not "given weight in the decision to reverse" (R. 288, fn.).

Judge Bone, concurring, expressed his "personal conviction that simple justice in this case would be served by affirmance of the judgment" (R. 289); that since respondent was "fully advised as to all of his legal rights" when he was arraigned upon the Norton assault charge, and again by Herring at the outset of the questioning on the Showalter killing, respondent did not "require the services of an attorney to know that he did not have

to 'talk' "; and that respondent's confession, coming as it did after two conferences with a priest, the second of which immediately preceded the confession, was the product of his "sense of guilt" and not the result of anything Herring said to him (R. 290-292, 294). Nevertheless, although he decried "the appalling possibility that a brutal murderer who had reached the maturity of manhood and who fully understood the nature of his horrible crime, may possibly escape punishment because of the suppression of this confession" (R. 295), Judge Bone felt constrained to hold (R. 292-294) that its admissibility under the *McNabb* and *Upshaw* doctrine turned upon its timing and not upon its truth and voluntary character (R. 293), and that in view of "the failure of the officers to have Carignan arraigned within the period indicated in Rule 5(a) (b) *before quizzing him in any manner* about his possible connection with the murder of Laura Showalter," the confession was "automatically" inadmissible (R. 292). He emphasized that his "concurrence rests *solely* upon the fact that [respondent] was not arraigned prior to being interrogated by the Marshal and prior to the making of the confession" (R. 294). Since there is nothing in Judge Bone's opinion indicating that he thought respondent's detention on the Norton assault charge was illegal under Rule 5, he held, in effect, that under the *McNabb* rule a voluntary confession of one crime, made after questioning a person who has been duly arraigned, fully advised of his rights,

and committed on a charge of another crime, is inadmissible unless he was, before the questioning, also arraigned for the crime to which he confessed.

Judge Pope pointed out in his dissenting opinion (R. 295-298) that at the time of his confession respondent "was being lawfully held after commitment upon a charge of attempted rape" upon Mrs. Norton (R. 296). Since, therefore, there was no illegal detention, he thought that the majority had extended the doctrine of the *Upshaw* case "beyond its intended or proper boundaries" (R. 295); that the decision "comes pretty close to holding that a confession cannot be taken in the absence of the accused's lawyer" (R. 296); and that "if there is to be any such drastic departure from previous notions as to the law, it should be accomplished by Congress, rather than by the courts" (R. 297).

#### SPECIFICATION OF ERROR TO BE URGED

The Court of Appeals erred in holding that respondent's written and oral admissions were inadmissible under the rule of *McNabb v. United States*, 318 U.S. 332, and *Upshaw v. United States*, 335 U.S. 410, and in reversing his conviction on that ground.

#### REASONS FOR GRANTING THE WRIT

Nothing in the *McNabb* and *Upshaw* decisions requires or justifies the holding below that respondent's concededly voluntary admissions were inadmissible under the rule, as stated in the *Upshaw* case, "that a confession is inadmissible if made

during illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the 'confession is the result of torture, physical or psychological. . . .'" (335 U.S. at 413). Here, as shown in the Statement, *supra*, pp. 5-6, respondent was promptly arraigned before the Commissioner on the Norton assault charge, fully advised of his rights to remain silent and to have counsel (see Rule 5(b), F.R. Crim. P., *supra*, p. 3, and R. 44), and duly committed. His later confession, after he had again been advised of these rights by Marshal Herring, that he attacked and beat Mrs. Showalter was thus made while he was lawfully held in the Marshal's custody. . .

The *McNabb* rule does not come into play unless the confession occurred during an illegal detention. Since respondent's detention during the period in which he confessed was entirely lawful, the *sine qua non* for applying the *McNabb* rule is absent in this case. That rule, which is not based upon constitutional considerations, is a rule of evidence enunciated by this Court in "the exercise of its supervisory authority over the administration of criminal justice in the federal courts" (318 U.S. at 340-341; see also *United States v. Mitchell*, 322 U.S. 65, 66, 68) to implement the policy of legislation (now embodied in Rule 5) requiring the prompt arraignment before a magistrate of a person arrested for crime (318 U.S. at 344-347). In this case, none of



the considerations which led to the promulgation of the *McNabb* rule is present. Legal cause for detaining respondent was promptly shown (see 318 U.S. at 344). Herring did not assume "functions which Congress has explicitly denied" him (*id.*, pp. 341-342). He did not subject respondent "to the pressures of a procedure [detention without arraignment] which is wholly incompatible with the vital but very restricted duties of the investigating and arresting officers of the Government" (*id.*, p. 342), for, in obedience to the mandate of Rule 5, respondent had been promptly arraigned and committed. There was no "misuse of the law enforcement process" (*id.*, p. 343), for there is no prohibition, other than the self-incrimination clause of the Fifth Amendment, against questioning a person lawfully detained in custody. "The mere fact that a confession was made while in the custody of the police does not render it inadmissible" (*id.*, p. 346; reiterated in *United States v. Mitchell*, 322 U.S. at 69).<sup>3</sup> -

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<sup>3</sup>See also the comment of the Advisory Committee on the Rules of Criminal Procedure on the Committee's proposed rule 5(b) in the Preliminary Draft of the rules, providing that "No statement made by a defendant in response to interrogation by an officer or agent of the government shall be admissible in evidence against him if the interrogation occurs while the defendant is held in custody in violation of this rule" (p. 11). The committee stated in its note to this proposed rule: "It is to be noted that the proposed rule does not exclude voluntary statements made in response to interrogation by officers unless at the time the statement is made the detention is unlawful under Subdivision (a); \* \* \*." (p. 13). The proposed rule was eliminated from subsequent drafts of the rules.

In short, as in the *Mitchell* case, where this Court sustained the admissibility of a confession made shortly after the defendant's arrest and before any illegal detention had occurred, "the foundations for application of the *McNabb* doctrine are here totally lacking" (322 U.S. at 69). As in that case, "there was no disclosure induced by illegal detention, no evidence was obtained in violation of any legal rights" (*id.*, p. 70). Indeed, this case is *a fortiori* from *Mitchell*, since here there was never any illegal detention.


We submit, therefore, that the dissenting judge below was right in his view that the majority's decision constitutes an unwarranted misapplication of the *McNabb* rule. The question thus presented as to the proper application of that rule is an important one in the administration of federal criminal justice which only this Court can authoritatively resolve. Cf. *United States v. Mitchell*, 322 U.S. at 66.

#### CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,  
*Solicitor General.*

FEBRUARY 1951.

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**No. 5**

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**the Supreme Court of the United States**

**OCTOBER TERM, 1951**

**UNITED STATES OF AMERICA, PETITIONER**

**vs**

**HARVEY L. CARIGNAN**

**WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT  
OF APPEALS FOR THE NINTH CIRCUIT**

**BRIEF FOR THE UNITED STATES**

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1951

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No. 5

UNITED STATES OF AMERICA, PETITIONER

v.

HARVEY L. CARIGNAN

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE NINTH CIRCUIT

---

BRIEF FOR THE UNITED STATES

---

OPINIONS BELOW

---

The opinions in the Court of Appeals (R. 283-298) are reported at 185 F. 2d 954.

JURISDICTION

The judgment of the Court of Appeals was entered December 8, 1950 (R. 299). On January 3, 1951, the time within which to file a petition for a writ of certiorari was extended by order of Mr. Justice Douglas to and including February 6, 1951 (R. 299). The petition was filed on February 5, 1951, and was granted on May 21, 1951. The jurisdiction of this Court is conferred

by 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

#### QUESTION PRESENTED

Respondent, having confessed that he assaulted a woman with intent to commit rape, was promptly arraigned and committed on that charge. While in custody, he was questioned about a similar offense, in which another woman had been murdered during the course of an attempt to commit rape, and confessed that he also had assaulted the second woman. The question is whether the Court of Appeals erred in holding that under the rule of *McNabb v. United States*, 318 U. S. 332, the latter confession is inadmissible merely because at the time it was given respondent, although in lawful custody, had not been arraigned on the charge to which he confessed.

#### STATUTES AND RULE INVOLVED

Alaska Compiled Laws Annotated, 1949:

SEC. 65-4-1. *First degree murder.* That whoever, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate, any rape, arson, robbery, or burglary, kills another, is guilty of murder in the first degree, and shall suffer death.

SEC. 65-4-2. \* \* \*. That in all cases where the accused is found guilty of the crime of murder under this and the next

preceding section, the jury may qualify their verdict by adding thereto "without capital punishment"; and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life.

**Rule 5, Federal Rules of Criminal Procedure:**

(a) *Appearance Before the Commissioner.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) *Statement by the Commissioner.* The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.



## STATEMENT

Respondent was convicted in the United States District Court for the Territory of Alaska of murder committed in an attempt to rape (R. 1, 29). As required by statute in the case of an unqualified verdict, he was sentenced to death (R. 33-34).

The evidence adduced at the trial established that, at about nine o'clock in the evening of July 31, 1949, in Anchorage, Alaska, one Keith, on his way home, noticed a man and woman lying in tall grass about 30 feet from the side of the road (R. 117-119, 125, 127). A red shoe was lying in the center of the roadway (R. 119). When Keith looked over the grass, the man rose up and told him to go on (R. 118). The woman lay motionless (R. 119).

The next morning, at the same location, Keith discovered the body of a semi-nude woman lying at the end of a swath through the grass, which looked as if it had been made by dragging someone through (R. 120, 129; see also R. 134, 158). Keith called the police (R. 120). Upon investigation, the body was identified as that of Mrs. Showalter (R. 155, 159, 169). The shoe in the road, its companion found near the body, and a pair of bi-focal glasses found on the path through the grass, were identified as hers (R. 134, 137, 148, 155-156, 157-158). When found, her body was partially clad in a red coat with a bloody scarf around the head. The dress and underclothes were torn (R. 133).

Keith identified respondent as resembling the man he had seen in the grass (R. 121, 130). A hat found near the body was proved to be identical with one worn by respondent on the night of the murder (R. 133, 135-136, 158, 205, 207).

Respondent signed a written confession in which he stated that, while he did not have a clear recollection, he remembered that, after leaving a bar on the night of July 31, he walked down the street and hit a woman, and that he remembered sitting on her and hitting her in the face with his fists (R. 233-235). Orally, respondent demonstrated his position when he held the woman, identified a picture of Mrs. Showalter as resembling the woman he attacked (R. 250-251), and admitted that the man's hat found at the scene of the crime was his (R. 235). When taken to the scene of the crime, he pointed out the spot where he had attacked the woman and the route he had taken back to Fort Richardson (R. 179, 183-184, 236-237).

The issue on this review is the admissibility of respondent's written and oral statements. The facts in the record bearing on this issue may be summarized as follows:

On the morning of Friday, September 16, 1949 (about six weeks after Mrs. Showalter's body was found), the Anchorage police called Petersen, an agent of the Criminal Investigation Division of the United States Army, at Fort Richardson, near Anchorage (R. 185-186), and

told him they wanted to speak to respondent and another soldier stationed at the Fort. Respondent accompanied Petersen to the Anchorage police station, arriving there about 11 a. m. He was placed in a line-up with four other men and was identified as her attacker by Mrs. Christine Norton, who was the victim of an assault with intent to commit rape on the night of September 14 (R. 186, 195). After brief questioning as to his activities on that night, respondent confessed to the assault on Mrs. Norton (R. 176-177, 195).

While awaiting an answer to Petersen's call to the Staff Judge Advocate at Fort Richardson to find out whether respondent could be released to the civilian authorities for prosecution on the Norton assault charge (R. 195), the police and Petersen questioned respondent briefly concerning the Showalter murder. Respondent denied knowing anything but newspaper accounts (R. 159-160, 170-171, 195). About noon of that same date (September 16) Keith was brought to the police station (R. 160-161) and identified respondent in a line-up as resembling the man he saw lying in the grass on the night of July 31 (R. 120, 130). Respondent refused to tell the police anything about his activities on July 31, but asked to talk to Petersen alone (R. 195-196). He asked Petersen what he should do and whether Petersen could help him. Petersen told respondent that he could not be compelled to make a statement. Petersen also said that if he were to

help he would need to have the facts about respondent's activities on that day (R. 192; see also R. 187, 195-196). Respondent told Petersen of some of his activities on July 31, but made no incriminating admissions. (R. 187, 191-192).

During all this period, respondent was not under technical arrest (R. 174-176, 186, 193). After the questioning mentioned above regarding the Showalter crime, respondent was asked to wait in the lobby of the police station. Two or three hours later, at approximately 4 p. m. on September 16, the United States Deputy Marshal appeared with a warrant for his arrest on the Norton assault charge (R. 174-176). He was immediately arraigned before the Commissioner on that charge, i. e., assault with intent to commit rape, a felony under Alaska law punishable by one to fifteen years imprisonment (Alaska Comp. Laws Ann., Section 65-4-16). At such arraignment he was advised of his constitutional rights, and committed (R. 44). He was detained in the city jail in the police station because there was no room for him in the Marshal's jail (R. 175).

The next morning, Saturday, September 17, the local police advised Herring, the United States Marshal, of respondent's arrest and the similarity of the attack upon Mrs. Norton to the Showalter crime. It was decided that Herring should question respondent "in an endeavor to get a state-



ment from him as to whether or not he had anything to do with the Showalter case" (R. 223).

About noon, Herring took respondent from the jail, treated him to lunch at a restaurant, and then took him to his office in the courthouse (R. 224-225). At the outset, Herring told respondent that "he did not have to make a statement at this time, that anything he said could be used against him, and that he was entitled to counsel if he so desired" (R. 224). They discussed respondent's background, and Herring said that his own was similar (R. 225, 231, 247). Respondent expressed a fear of his "neck stretching" if he talked. Herring told him "it was something I couldn't tell him, promise him, one way or the other as to what was going to happen to his neck, that it was entirely a matter for the jury." (R. 225.) Respondent asked to see a priest and Herring found one after an hour's hunt. After talking to the priest alone for about an hour, respondent told Herring he would give him a statement. Herring furnished respondent with paper and pencils and returned him to the city jail, leaving instructions that he was not to be disturbed. (R. 220, 225-227.) When Herring left respondent he told him "that after he had written the statement, if he did not care to give it to me he could tear it up and flush it down the toilet" (R. 220).

The next day, Sunday, September 18, Herring visited respondent briefly at the jail "to see how

he was getting along, to see if he needed any cigarettes," but did not question him (R. 227-228).

Monday morning, September 19, Herring took respondent to the grand jury room in the courthouse, and asked respondent if he had a statement he wished to give him. Respondent said he had a statement, but that he wished to see the priest first. He again talked to the priest alone for about an hour, and then gave Herring the statement he had prepared, adding, however, that there was "nothing in it." (R. 220, 228-229.) At that time the statement recounted respondent's activities on July 31 only until he left a bar at about 9:00 p. m. Respondent told Herring he was "afraid to put the rest of it down for fear that he wouldn't be believed, and for fear that his neck would stretch." (R. 220-221.) Anchorage police officers who were in the room at the time suggested that respondent might like to talk with the Marshal alone, and respondent said that he would. After five or ten minutes' further conversation with Herring, respondent completed the written statement which was admitted in evidence. Herring told respondent that he "could still destroy [the statement] if he wished." Herring testified further that no promises of any kind were made to respondent and that he was never threatened, but, on the contrary, "was treated with the utmost courtesy at all times, as if a guest in my own home." (R. 221.)

When the prosecution offered respondent's written statement in evidence, respondent's counsel requested and was granted permission to cross-examine Herring before the jury "to determine [its] admissibility" (R. 221-222). In the course of this cross-examination, Herring stated that when respondent expressed fear "that his neck would stretch, \* \* \* I told him that I could not promise him anything, and I told him in the time I had been in this division for twenty-seven years that there had been no hanging, what would happen to him I couldn't promise him or anyone else" (R. 230). Herring had pictures of Christ and various saints on the walls of his office. He said that in his talk with respondent in the office he showed him the picture of Christ, and asked "What he thought his Maker would think about him," and that he might have suggested "that his Maker might think more of him if he told the truth about this." (R. 230-231.) He also said that respondent asked him what kind of a place McNeil Island Penitentiary was, and that he told respondent he "had known men that had been there and learned a trade and that made something of their lives, and it may be that I told him of one specific instance of a man that learned a boat-building trade there" (R. 231).<sup>1</sup>

<sup>1</sup> It is not clear from the testimony whether these conversations took place on Saturday or Monday.

After Herring's cross-examination was completed, and before respondent's written statement was admitted in evidence, his counsel requested that the jury be excused, and that respondent be allowed to testify "on the taking of this statement." The court denied the motion, stating that it had "heard enough evidence on this matter." (R. 232). The court then overruled respondent's objection to the admissibility of his statement on the ground that it was the result of promises and inducements (R. 232-235).

The Court of Appeals, with Judge Pope dissenting, reversed respondent's conviction on the ground that his written and oral admissions were inadmissible under the rule of *McNabb v. United States*, 318 U. S. 332.

Although Judge Healy, one of the majority, thought that "something approaching psychological pressure, not unmixed with deceit, contributed to the extraction of the confession" (R. 288, fn.), Judge Bone, concurring, and Judge Pope, dissenting, agreed that respondent's admissions were entirely voluntary (R. 290-292, 294, 296), with the result that Judge Healy's view in this regard was not "given weight in the decision to reverse" (R. 288, fn.).

Judge Bone, concurring, expressed his "personal conviction that simple justice in this case would be served by affirmance of the judgment" (R. 289); that since respondent was "fully advised as to all of his legal rights" when he was



arraigned upon the Norton assault charge, and again by Herring at the outset of the questioning on the Showalter killing, respondent did not "require the services of an attorney to know that he did not have to 'talk'"; and that respondent's confession, coming as it did after two conferences with a priest, the second of which immediately preceded the confession, was the product of his "sense of guilt" and not the result of anything Herring said to him (R. 290-292, 294). Nevertheless, although he decried "the appalling possibility that a brutal murderer who had reached the maturity of manhood and who fully understood the nature of his horrible crime, may possibly escape punishment because of the suppression of this confession" (R. 295), Judge Bone felt constrained to hold (R. 292-294) that its admissibility under the *McNabb* and *Upshaw* (335 U. S. 410) doctrine turned upon its timing and not upon its truth and voluntary character (R. 293), and that in view of "the failure of the officers to have Carignan arraigned within the period indicated in Rule 5 (a) (b) before quizzing him in any manner about his possible connection with the murder of Laura Showalter," the confession was "automatically" inadmissible (R. 292). He emphasized that his "concurrence rests solely upon the fact that [respondent] was not arraigned prior to being interrogated by the Marshal and prior to the making of the confession" (R. 294). Since there

is nothing in Judge Bone's opinion indicating that he thought respondent's detention on the Norton assault charge was illegal under Rule 5, he held, in effect, that under the *McNabb* rule a voluntary confession of one crime, made after questioning a person who has been duly arraigned, fully advised of his rights, and committed on a charge of another crime, is inadmissible unless he was, before the questioning, also arraigned for the crime to which he confessed.

Judge Pope pointed out in his dissenting opinion (R. 295-298) that at the time of his confession respondent "was being lawfully held after commitment upon a charge of attempted rape" upon Mrs. Norton (R. 296). Since, therefore, there was no illegal detention, he thought that the majority had extended the doctrine of the *Upshaw* case "beyond its intended or proper boundaries" (R. 295); that the decision "comes pretty close to holding that a confession cannot be taken in the absence of the accused's lawyer" (R. 296); and that "if there is to be any such drastic departure from previous notions as to the law, it should be accomplished by Congress, rather than by the courts" (R. 297).

#### SPECIFICATION OF ERROR TO BE URGED

The Court of Appeals erred in holding that respondent's written and oral admissions were inadmissible under the rule of *McNabb v. United States*, 318 U. S. 332, and *Upshaw v. United*

*States*, 335 U. S. 410, and in reversing his conviction on that ground.

#### SUMMARY OF ARGUMENT

At the time he confessed, respondent was legally in custody in default of bail after valid arraignment on a bona fide charge. The questioning was for short periods of time, was conducted with gentleness and courtesy, and was unaccompanied by threats or promises. Since there was no illegal detention, the rule of *McNabb v. United States*, 318 U. S. 332 and *Upshaw v. United States*, 335 U. S. 410, has no application. Those cases hold that, where a suspect is illegally detained for the purpose of questioning, a confession obtained during the period of illegal detention is inadmissible in the federal courts. They do not hold that a person validly in custody may not be questioned before arraignment on the particular charge to which the questioning is directed.

Normal police procedure in the case of an unwitnessed crime is to question persons believed to have some knowledge of the facts. Had respondent been at large, the Marshal or police, with reason to suspect him, would undoubtedly have endeavored to talk to him. The fact that respondent happened to be in the Marshal's custody under another charge may have made it easier for the Marshal to interrogate him, but did not make such normal interrogation unlaw-

ful. In fact, the Marshal would have been derelict in his duty to solve an unwitnessed murder had he not questioned a suspect, available for questioning, who had already admitted committing a similar offense.

Questioning of a suspect in custody after proper arraignment on a bona fide charge does not violate the spirit of the *McNabb* rule. The evil which the rule was intended to mitigate is secret interrogation without the advice of friends or the assistance of counsel. A person in custody after arraignment has, however, been advised of his constitutional rights, including the right to counsel. He knows that counsel is available to him if he wishes to consult one. The questioning of a suspect who happens to be in custody thus violates neither the spirit nor the letter of the rule.

#### ARGUMENT

##### PRELIMINARY STATEMENT

The Court of Appeals in this case concerned itself mainly with the issue of the admissibility of respondent's confession, a majority holding that under the rule of the *McNabb* and *Upshaw* cases the confession was inadmissible because at the time it was made respondent, although in lawful custody on another charge, had not been arraigned on the charge to which he confessed. This holding was the sole basis for the petition for certiorari.



Both in the Court of Appeals (R. 283, and see also R. 36-37) and in his brief in opposition to certiorari, however, respondent has raised other questions. He has contended (1) that the trial court erred in refusing to permit him to take the stand and testify, in the absence of the jury, as to the facts concerning the admissibility of the confession; (2) that the confession was involuntary; (3) that the trial court should have granted respondent's motion for a change of venue; and (4) that the verdict was not supported by the evidence. Respondent is entitled, of course, to urge these grounds in support of the judgment below in his favor. *Langnes v. Green*, 282 U. S. 531, 538; *Walling v. General Industries Co.*, 330 U. S. 545, 547. It is necessary, therefore, for the Government to state its position as to these other issues. The third and fourth contentions, as to venue and sufficiency of the evidence, were considered and rejected by the court below (R. 289), and its decision in that regard is so clearly correct as to require no further discussion here.<sup>2</sup> However, respondent's objec-

<sup>2</sup> The Court of Appeals disposed of these two points in the following sentences: "The granting or denial of the motion for removal of the cause was a matter within the judgment and discretion of the court and we cannot say that the discretion was abused. There was sufficient evidence to support a finding that Mrs. Showalter was murdered in the course of an attempt to rape her." The ruling as to venue is sustained by *Stroud v. United States*, 251 U. S. 15, 18-20, and *Kersten v. United States*, 161 F. 2d 337, 339 (C. A. 10), certiorari denied, 331 U. S. 851. The sufficiency of the evidence to sup-

tion to the trial court's refusal to permit him to take the stand and testify in the absence of the jury as to the facts concerning the admissibility of the confession raises a more difficult question. The procedure followed at the trial, of which respondent complains, was as follows:

The evidence on the issue of admissibility was developed in the presence of the jury, chiefly during the examination and cross-examination of United States Marshal Herring, to whom the confession was allegedly made (R. 218-251). During the direct examination, the prosecution offered the confession in evidence (R. 221). At that point, the direct examination was interrupted to allow respondent's counsel to cross examine Herring as to the circumstances under which it was obtained (R. 222-232). After this cross-examination, respondent's counsel stated to the court that "at this time, we would like to have the jury excused, and we would like to call Mr. Carignan to the stand and examine him on the taking of this statement" (R. 232). The court replied: "Well, the motion is denied. I have heard enough evidence on this matter" (*Ibid*). Government counsel thereupon again offered the confession in evidence and it was admitted over objection by defense counsel (R. 232-233). Respondent did not thereafter take the

port the verdict is shown by the evidence summarized in the Statement, *supra*, and in Judge Healy's opinion for the court below (R. 284-285).

stand. After his conviction, respondent applied for leave to appeal *in forma pauperis* (R. 35-37). In allowing this motion, the district court delivered an opinion in which it stated, *inter alia*, as follows (R. 40):

\* \* \* I am of the opinion that counsel is mistaken [in urging as error the court's refusal to hear the defendant's version, out of the presence of the jury, as to the circumstances under which the confession was obtained]. If any error was committed, it was committed not in refusing to hear the defendant in connection with a preliminary inquiry conducted in the absence of the jury, but in admitting the confession into evidence in connection with the witness Herring's testimony. Once the Court became convinced that the confession had been freely and voluntarily made, the testimony of the defendant, if received preliminarily, could have accomplished no more than to present a conflict in the testimony, thus requiring the submission of the question to the jury.

Respondent's objection to the above procedure admittedly presents a substantial and doubtful question. The Government agrees that the better practice, when the admissibility of a confession offered in evidence is objected to by the defense, is for the trial judge to excuse the jury and hold a hearing as to the facts bearing on admissibility.

Cf. *McNabb v. United States*, 318 U. S. 332; *Nardone v. United States*, 308 U. S. 338, 341-342; *Steele v. United States No. 2*, 267 U. S. 505, 511; *Wilson v. United States*, 162 U. S. 613, 624; *United States v. Lustig*, 163 F. 2d 85, 89 (C. A. 2); *Cohen v. United States*, 291 Fed. 368, 369 (C. A. 7); but cf. *Holt v. United States*, 218 U. S. 245, 249-250. And, whatever the quantum of evidence required to establish admissibility,<sup>3</sup> the defendant, particularly in a capital case like this, should be afforded the opportunity to present his version of the circumstances surrounding the alleged confession. For this reason the Government does not object to a new trial at which the circumstances surrounding the making of the confession may be fully canvassed. Accordingly, since the issue of voluntariness will have to be retried, it is not necessary to discuss here respondent's further contention that the confession was involuntary.

The Government brought the case to this Court primarily in order to correct the fundamental

<sup>3</sup> As to the differences in views concerning the relative functions of judge and jury in passing upon the voluntariness of confessions offered in evidence, see, generally, 170 A. L. R. 568 and cases cited. Compare *Pon Wing Quong v. United States*, 111 F. 2d 751 (C. A. 9), and *United States v. Lustig*, 163 F. 2d 85, 89 (C. A. 2), with *McAffee v. United States*, 111 F. 2d 199, 200-201 (C. A. D. C.), *Catoe v. United States*, 131 F. 2d 16 (C. A. D. C.), *Cohen v. United States*, 291 Fed. 368, 369 (C. A. 7). See also Wigmore, *Evidence* (3rd ed.) § 861.



errors of law made by the court below as to the scope of the *McNabb* rule. The fact that a new trial will be required does not mean that the *McNabb* issue is not appropriately before this Court for review. The court below has held that, on the evidence in *this* record, even apart from what respondent might testify at a new trial, respondent's confession was inadmissible as a matter of law, because, at the time the confession was made, he had not been arraigned on the charge to which he confessed. The correctness of this ruling of law is crucial to this case, and should be decided before a new trial is held. Concededly, respondent had not been arraigned on the Showalter charge when he confessed to that crime. If the Court of Appeals is right, that fact without more would automatically preclude admission of the confession and no further inquiry would be necessary into the issue of voluntariness or into the circumstances surrounding the making of the confession. We believe that on the facts contained in the present record this ruling of law by the Court of Appeals was erroneous. The Government desires to obtain on this review a clarification of the *McNabb* rule as applied to a situation of this sort. It is desirable that guidance be given the lower courts in the present case, on a new trial, as to the correct rule of law which applies.

SINCE RESPONDENT'S CONFESSION WAS MADE WHILE LEGALLY IN CUSTODY, AFTER VALID ARRAIGNMENT ON A BONA FIDE CHARGE, THE McNABB RULE, WHICH IS BASED ON ILLEGAL DETENTION, HAS NO APPLICATION

The issue before this Court arises from these facts as disclosed in the record:

Respondent was validly arrested and arraigned for one crime and held in custody in default of bail. While in such custody, he was questioned about a similar offense, an unwitnessed murder, as to which the law-enforcement officers had reason to suspect, but insufficient proof to accuse, him. Before being questioned, he was informed of his constitutional rights. The questioning was for short periods of time, was conducted with gentleness and courtesy, and was unaccompanied by threats or promises. As a result of such questioning, respondent made a voluntary confession.

The issue is whether a confession made under such circumstances is inadmissible under the rule laid down by this Court in *McNabb v. United States*, 318 U. S. 332, as clarified in *Upshaw v. United States*, 335 U. S. 410.

We submit that the confession here involved cannot be deemed inadmissible under the *McNabb* rule. That rule does not come into play unless the confession occurred during a period of illegal detention. The rule, which is not based upon constitutional considerations, is a rule of evidence enunciated by this Court "in the exercise of its supervisory authority over the administra-

tion of criminal justice in the federal courts" (318 U. S. at 340-341), to implement the policy of legislation, now embodied in Rule 5 of the Federal Rules of Criminal Procedure, requiring the prompt arraignment before a magistrate of a person arrested for a crime. 318 U. S. at 344-347. It is based on the theory that a confession "induced by illegal detention" should be outlawed since the Government should not be allowed to avail itself of "the fruits of wrongdoing" by its officers. See *United States v. Mitchell*, 322 U. S. 65; 70; *Upshaw v. United States*, 335 U. S. 410, 413-414.

After the *McNabb* decision there was some confusion among the lower courts as to whether mere delay in arraignment, without use of the period of delay for prolonged and continuous questioning of a suspect, was in itself sufficient wrongdoing by the officers to justify application of the *McNabb* rule.<sup>4</sup> The decision of this Court in the *Upshaw* case resolved that conflict by holding that, since purposeful delay in arraignment in order to question a suspect was a violation of

<sup>4</sup> Cf. *Boone v. United States*, 164 F. 2d 102 (C. A. D. C.), and *Alderman v. United States*, 165 F. 2d 622 (C. A. D. C.), with *United States v. Hoffman*, 137 F. 2d 416, 421 (C. A. 2). See also *United States v. Grote*, 140 F. 2d 413, 414-415 (C. A. 2); *Paddy v. United States*, 143 F. 2d 847, 852 (C. A. 9); *United States v. Ebeling*, 146 F. 2d 254, 256 (C. A. 2); *Rühl v. United States*, 148 F. 2d 173, 175-176 (C. A. 10); *Brady v. United States*, 148 F. 2d 394, 395 (C. A. 9); *Chevillard v. United States*, 155 F. 2d 929, 935-936 (C. A. 9).

Rule 5 (a), a confession obtained during such period, even without prolonged and continuous questioning, was "induced by the illegal detention" and therefore inadmissible. Nothing in the *Upshaw* decision, however, justifies the holding of the court below that a confession, elicited by questioning before arraignment on the particular crime to which the questioning was directed, is automatically outlawed under the *McNabb* rule, without regard to the legality of the custody in which the suspect was held.<sup>5</sup> In the *Upshaw* case, as in *McNabb*, the controlling consideration which rendered the confession inadmissible was the illegal act of the Government

<sup>5</sup> Judge Bone, whose opinion on the *McNabb* point embodies the actual holding of the court below, has subsequently modified his view with respect to the meaning of the *McNabb* and *Upshaw* decisions. In *Haines v. United States*, 188 F. 2d 546 (C. A. 9), petition for a writ of certiorari pending, No. 174, writing for a majority which held admissible a confession made after arrest and before arraignment, even though arraignment had been delayed for 24 hours to allow the suspect to identify certain materials, he stated that "the bare failure" to have the prisoner arraigned immediately did not necessarily invalidate a confession. He attempted to distinguish the instant decision on the ground that detention of this respondent, after arraignment on the other charge, was coercive in that it was employed for the purpose of securing a confession and that this purpose, coupled with delay in arraigning respondent on the murder charge and other incidents, made up a "totality of circumstances" which rendered the confession inadmissible. 188 F. 2d at p. 552. However, in his opinion in this case, Judge Bone made it clear that he thought the time of arraignment alone, and no other factor, rendered the confession inadmissible.



officers in detaining the defendant beyond a reasonable time in violation of Rule 5 (a).

The factor of illegal detention is not present in this case. Respondent was legally in custody after having been validly arraigned on a bona fide charge against him. The charge on which he was arraigned was a serious one—the commission of a felony punishable by a maximum imprisonment of 15 years (*supra*, p. 7). The fact that respondent had been identified as the perpetrator of one crime did not of course release the police officers and the Marshal from their obligation to solve the unwitnessed murder of Mrs. Showalter. As to that murder, they had reason to suspect respondent because of the similarity of the crime to the attack on Mrs. Norton to which he had just confessed and Keith's tentative identification.

Normal, if not, indeed, indispensable police procedure, in the case of an unwitnessed murder, is to interrogate persons believed to have some knowledge of the crime.\* Had respondent been at large, the police or the Marshal, with reason to suspect him, would undoubtedly have endeavored to talk to him; and police officers are not, and should not be, required to arrest or arraign

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\* See the concurring opinion of Mr. Justice Jackson in *Watts v. Indiana*, 238 U. S. 49, 61, and his dissenting opinion in *Ashcraft v. Tennessee*, 322 U. S. 143, 160, 168-169, and the dissenting opinion of Mr. Justice Burton in *Haley v. Ohio*, 332 U. S. 596, 614.

a person before interrogating him as to a crime. The fact that respondent, as a soldier, was subject to military orders might have made it easier for the officers to find him and interrogate him than would have been the case had he been a civilian. The fact that he happened actually to be in the custody of the Marshal in default of bail on the Norton charge unquestionably made it still easier for the officers to question him. Law enforcement is not, however, such a sporting game that officers are precluded from taking advantage of circumstances that happen to be in their favor.

The fact is that the Marshal was guilty of no wrongdoing in holding respondent in custody. He was guilty of no wrongdoing in questioning a suspected person who happened validly to be in his custody. This Court has many times reiterated in one form or another the statement, which appears in the *McNabb* decision itself, that "the mere fact that a confession is made while in the custody of the police does not render it inadmissible." 318 U. S. at p. 346. See also *United States v. Mitchell*, 322 U. S. at p. 69; *Lyons v. Oklahoma*, 322 U. S. 596, at p. 501; *Watts v. Indiana*, 338 U. S. 49, at p. 53.<sup>7</sup> The Marshal would

<sup>7</sup> See also the comment of the Advisory Committee on the Rules of Criminal Procedure on the Committee's proposed Rule 5 (b) in the Preliminary Draft of the rules, providing that "No statement made by a defendant in response to interrogation by an officer or agent of the government shall be admissible in evidence against him if the interrogation occurs while the defendant is held in custody in violation of this

of course have had no right to abuse the advantage he obtained from respondent's custody on another charge to extort a confession from him by coercive methods. Constitutional guarantees, independently of the *McNabb* rule, would prevent the use of any confession so obtained.<sup>8</sup> No coercion of any kind was, however, used here. Respondent was questioned as any suspect at large might validly have been questioned, for short periods of time, with due warning of his constitutional rights, and without threats or promises. The officers and Marshal would have been derelict in their duty to endeavor to solve an unwitnessed murder if they had not questioned a person reasonably suspected of implication in the crime who was available for questioning. Since, therefore, the Marshal was acting properly in holding respondent and in questioning him, there is no occasion to apply the *McNabb* rule to this confession.

None of the considerations which led to the promulgation of the *McNabb* rule is present here. Legal cause for detaining respondent was promptly shown (see 318 U. S. at 344). The Marshal did not assume "functions which Con-  
rule" (p. 11). The committee stated in its note to this proposed rule: "It is to be noted that the proposed rule does not exclude voluntary statements made in response to interrogation by officers unless at the time the statement is made the detention is unlawful under Subdivision (a); \* \* \*" (p. 13). The proposed rule was eliminated from subsequent drafts of the rules.

<sup>8</sup> *Ziang Sung Wan v. United States*, 266 U. S. 1; see also *Watts v. Indiana*, 338 U. S. 49, 51, and cases noted therein.

gress has explicitly denied" him (*id.*, pp. 341-342). He did not subject respondent "to the pressures of a procedure [detention without arraignment] which is wholly incompatible with the vital but very restricted duties of the investigating and arresting officers of the Government" (*id.*, p. 342), for he was properly holding respondent in custody in default of bail after a valid arraignment. There was no "misuse of the law enforcement process" (*id.*, p. 343), for the questioning of respondent was conducted without coercion of any kind. The confession by respondent was not the fruit of any wrongdoing by the Government officers; it was the result of proper questioning of a person legally detained. This point was forcefully made by Judge Pope in his dissenting opinion below (R. 296-297):

\* \* \* Assume a case in which the police have been confronted with a dozen holdups of branch stores, where the circumstances disclose similarities in the manner of commission of these crimes. The police discover probable cause for charging the accused with one of the robberies, and he is so charged, bound over and committed. While thus being held, the accused makes a statement admitting commission of all the others.

Certainly my associates would not say that the statement would be inadmissible because of the want of eleven more commitments, as such. \* \* \*



As was pointed out in more detail in the Government's brief in the *Upshaw* case, almost all students of the problems of investigation and detention agree that some questioning of persons accused of crime is necessary and desirable under our system of law enforcement. The National Commission on Law Observance and Enforcement in its *Report on Lawlessness in Law Enforcement* observed at p. 174, "Few of our informants wish to deprive the police of the power to question persons under arrest." See also Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315; Hall, *Law of Arrest in Relation to Social Problems*, 3 U. of Chic. L. Rev. 345; Fraenkel, *From Suspicion to Accusation*, 51 Yale L. J. 748; Waite, *Police Regulation by Rules of Evidence*, 42 Mich. L. Rev. 679; Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 Ill. L. Rev. 442. It would be almost impossible to solve an unwitnessed crime, such as the one here involved, without questioning persons believed to have information. It has been suggested that questioning by officers should be regulated by legislation,<sup>9</sup> but thus far Congress has taken no action in this direction.<sup>10</sup>

As noted above, this Court has specifically recognized the right of officers to question a per-

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<sup>9</sup> The Commission on Law Observance recommended interrogation of suspected persons before a magistrate. *Report on Lawlessness in Law Enforcement*, p. 5. Professor Waite made a similar proposal at the time Rule 5 (a) of the Federal Rules of Criminal Procedure was being drafted. See Pre-

son in custody. It has held that such questioning, even before arraignment, is permissible if arraignment is not unduly delayed for such purpose. See *United States v. Mitchell*, 322 U. S. 65, 69-70.<sup>11</sup> Certainly, if a person in custody may be questioned before he has been solemnly informed at a judicial hearing of his right to counsel, there is no reason why a person who has been informed of such rights on arraignment for another crime should not be questioned.

Whatever dangers of abuse may exist in the questioning of a suspect before arraignment largely disappear in the situation where the questioning is of a person validly in custody on another charge. In the *McNabb* case, and in recent confession cases from state courts, where failure to arraign was one of the factors considered with other evidence of coercive methods, this Court has

liminary Draft, pp. 248-250, 253-254. The formulators of the Uniform Arrest Act suggested the legalization of a period of detention not amounting to arrest for a period of two hours and arraignment within 24 hours after arrest. See Warner, *Uniform Arrest Act*, 28 Va. L. Rev. 315, 339-342, 344, 347.

<sup>10</sup> A bill to overrule the *McNabb* rule several times passed the House but not the Senate. H. R. 3690, 78th Cong., 1st sess.; H. Rep. No. 1509, 78th Cong., 2nd sess.; 90 Cong. Rec. 9376; H. Rep. No. 245, 79th Cong., 1st sess.; 91 Cong. Rec. 2508; 92 Cong. Rec. 10,380; 93 Cong. Rec. 1392; H. Rep. No. 29, 80th Cong., 1st sess.

<sup>11</sup> See also *Wheeler v. United States*, 165 F. 2d 225 (C. A. D. C.), certiorari denied, 333 U. S. 829; *Garner v. United States*, 174 F. 2d 499, 502 (C. A. D. C.), certiorari denied, 337 U. S. 945; *Haines v. United States*, 188 F. 2d 546 (C. A. 9), petition for a writ of certiorari pending, No. 174.

emphasized that a suspect questioned before arraignment is "without the aid of friends or the benefit of counsel." (318 U. S. at p. 345.)<sup>12</sup> A person who has been arraigned and committed on another charge has, however, been informed that he has a right to counsel, a right to remain silent, and that anything he says may be used against him (Rule 5 (b), *supra*, p. 3); he has been produced in open court and given an opportunity to receive the aid of friends and benefit of counsel. Manifestly, a person who has been told that he has such rights as to one crime knows that he has such rights as to some other crime. If he has obtained counsel in respect of the crime for which he was arraigned, he would be able to consult counsel with regard to any other crime of which he is suspected. The propriety of the method of questioning while in custody is, as we have noted, safeguarded by the constitutional limitation against the use of coerced confessions. The safeguards erected by the *McNabb* rule, which have the effect of informing an accused of his right to counsel, are unnecessary where that information has been given on the prior arraignment.

Questioning of a person in custody after a valid arraignment and commitment on a bona fide charge of another crime thus falls neither within the rationale of the *McNabb* rule, which

<sup>12</sup> See *Watts v. Indiana*, 338 U. S. 49, 53; *Haley v. Ohio*, 332 U. S. 596, 600; *Malinski v. New York*, 324 U. S. 401, 405..

is based on outlawing the fruits of illegal detention by Government officers, nor within the spirit of that rule, in so far as it is designed to enable a suspect, if he so chooses, to obtain the aid of friends and advice of counsel. It was therefore error for the court below to hold inadmissible in evidence a voluntary confession elicited by proper questioning of respondent while he was validly in custody in default of bail after proper arraignment on a bona fide charge.

#### CONCLUSION

The holding of the Court of Appeals that under the *McNabb* rule respondent's confession was inadmissible as a matter of law is erroneous. The judgment below should therefore be set aside and the case remanded to the district court for a new trial in order that respondent may be afforded an opportunity to testify, in the absence of the jury, as to the circumstances in which the confession was made.

Respectfully submitted.

PHILIP B. PERLMAN,  
*Solicitor General.*

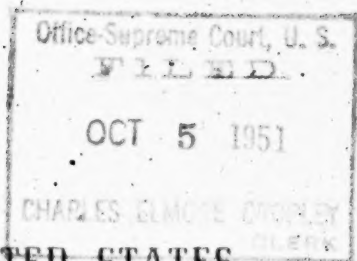
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SEPTEMBER 1951.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 5

UNITED STATES OF AMERICA,

*Petitioner,*

*vs.*

HARVEY L. CARIGNAN

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

HAROLD J. BUTCHER,  
*Attorney for Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
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BRIEF FOR RESPONDENT

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Opinions Below

The opinions of the Court of Appeals (R. 283-298) are reported at 185 F.2d 954.

Jurisdiction

The judgment of the Court of Appeals was entered December 8, 1950 (R. 299). On January 3, 1951, the time within which to file a petition for a writ of certiorari was

extended by order of Mr. Justice Douglas to and including February 6, 1951 (R. 299). The petition was filed on February 5, 1951, and was granted on May 21, 1951. The jurisdiction of this Court is conferred by 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

### **Questions Presented**

Respondent restates the questions presented in the government brief to more closely conform with the facts and the opinion of the Court below and also presents other questions of grave relevancy to a comprehensive and clarifying opinion.

#### **First Question**

Respondent, a soldier, being suspected of an assault upon a woman, one Christine Norton, was brought, by an officer, from Fort Richardson, a military post near Anchorage, to the Anchorage Police Station in the forenoon of the 16th day of September, 1949. There he was interrogated by City Police Officers in connection with the Norton assault and was also interrogated concerning another woman, Agnes Showalter, who had been found dead on the morning of August 1, 1949. During the interrogation, respondent admitted the assault upon Christine Norton but denied any knowledge of the death of Agnes Showalter. He was, however, positively identified by the witness Keith as the man in the grass beside the woman who Keith subsequently found dead (R. 120). Respondent was held in the Police Station during the interrogation and until about 4:30 P. M. of the 16th, at which time or shortly thereafter a Deputy U. S. Marshal placed respondent under arrest on the Norton charge, whereupon he was taken before the U. S. Commissioner who informed him of the Norton charge, advised him of his rights, set bail at \$5,000.00, and ordered him into the



custody of the U. S. Marshal pending grand jury investigation. Unable to make bail, he was returned to the city jail and while in custody there, was further interrogated by City Police. On the following morning, September 17th, 1949, he was taken from the jail to the office of the U. S. Marshal, where the interrogation was continued with the Marshal participating. Near the hour of 12 o'clock A. M. on the 19th day of September, after several sessions of exhaustive questioning, he admitted in writing that he had, on the evening of July 31, struck with his fists, a woman who he subsequently learned was Agnes Showalter. The question is whether the Court of Appeals erred in holding that respondent's confession was inadmissible because the circumstances of its taking violated the spirit and intent of Rule 5, Federal Rules of Criminal Procedure and the rule of *McNabb v. U. S.*, 318 U. S. 332, as further expounded in *Upshaw v. U. S.*, 335 U. S. 410, because at the time it was taken, respondent although in lawful custody on the Norton charge and although he had been previously positively identified as the man who had been with the woman at the place where she was later found dead, had not been arrested, had not been taken before a magistrate, and had not been charged with the Showalter death, or informed of his rights in connection therewith.

### Second Question

Whether the trial court erred when it admitted into evidence over respondents objection, respondents purported confession, after refusing his request to testify, in the absence of the jury, as a matter preliminary, to the admission of the confession, which had been offered in evidence by the prosecution on the testimony of the police officer who had received it and whose testimony the respondent was

unwilling to let stand as a true version of the interrogatory process, leading to the making of the confession.

### Third Question

Whether respondent's confession, taken under the circumstance set forth in the record, was involuntary in character as being extracted by secret interrogation, promises, inducements, and psychological pressure on the part of the Police Officers.

### Fourth Question

Whether the trial court having ruled defendant's purported confession admissible, solely upon the testimony of a Police Officer testifying for the Prosecution (R. 233) and having denied defendant's objection to the introduction of the confession on the ground that it was not voluntary, and having refused to hear the defendant's version of the taking of the confession, erred in failing to submit to the jury, by appropriate instruction, as a question of fact, the voluntary or involuntary character of the confession (Instructions R. 23 to 28, incl.).

### Statutes and Rule Involved

Alaska Compiled Laws Annotated, 1949:

Sec. 65-4-1. *First degree murder.* That whoever, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate, any rape, arson, robbery, or burglary, kills another, is guilty of murder in the first degree, and shall suffer death.

Sec. 65-4-2. \* \* \* That in all cases where the accused is found guilty of the crime of murder under this and the next preceding section, the jury may qualify their verdict by adding thereto "without capital punishment"; and whenever the jury shall return a ver-

dict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life.

**Rule 5, Federal Rules of Criminal Procedure:**

(a) *Appearance Before the Commissioner.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) *Statement by the Commissioner.* The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

**Statement of Facts**

Respondent adopts for the purpose of this brief the statement of fact contained in the brief filed by the government with the following corrections.

The confession as set out in the record (R. 233-235) states at line 10, page 235 "The first thing I remembered was me sitting and hitting a woman in the face with my fists". There is no statement in the confession that defendant was sitting on the woman and, therefore, the government's brief is inaccurate as to that fact (Government Brief, page 5, line 11).

The government in its brief, page 6, line 9, uses the phrase "brief questioning". Respondent was taken to the Police Station on the forenoon of September 16th. He was detained there until 4:30 P. M. (R. 174). He was questioned by Police Officer Barkdoll (note Barkdoll's confusion as to length of question period R. 176, line 25 to end of page). He was questioned by C. I. D. Officer Peterson, who brought respondent to the Police Station in the morning and remained there with him all afternoon (R. 194). He was picked out of a "line up" by Christine Norton, as the man who assaulted her. He was picked out of a "line up" by the witness Keith who positively identified respondent as the man whom he had seen beside the woman on the evening of July 31, whom the witness later found dead (R. 120-121).

Respondent believes that the description here and elsewhere in the government's brief, as to the period of time occupied by the interrogation, as "brief" or "briefly" cannot be supported by the record.

On page 7 of the government brief, it is twice stated that respondent was immediately arraigned before the Commissioner charged with assault with intent to commit rape. The fact is that he was not arraigned before the Commissioner at any time, but was only taken before the Commissioner in the late afternoon of September 16th, where the complaint was read, where he was advised of his rights and where he was committed to the custody of the Marshal with bail set at \$5,000.00 to await action of the grand jury. Respondent was actually arraigned on the Christine Norton charge on October 19th, when the indictment was read and counsel appointed for him. (See certified copy of indictment, minutes of arraignment, etc., all in *Norton* case, forwarded by the Clerk of the District Court for the Third Division, Territory of Alaska, to the Clerk of the Supreme Court, under seal.)



The statements contained in the last paragraph on page 7 of the government brief, are not correct. At the time Officer Barkdoll advised the U. S. Marshal of respondent's arrest, and it was decided that the Marshal should question respondent "in an endeavor to get a statement from him as to whether or not he had anything to do with the Showalter case (R. 233)." Respondent had already been positively identified by the witness Keith as the man who was in the grass with Agnes Showalter at Eighth and A Streets on the evening of July 31st, subsequently found dead by Keith. (R. 120). Therefore, the statement on Page 7 that the similarity of the two attacks was the only reason for the questioning of respondent by the Marshal is untrue.

The government on page 10, line 18, states that U. S. Marshal Herring *might* have suggested to respondent, while he had him looking into the pictured eyes of Christ, "that his Maker might think more of him if he told the truth about this". The record (R. 331, line 4 to 10) indicates that the Marshal not only *might* have suggested the fear-of-God appeal to respondent but in fact did suggest it. (Emphasis ours.)

However, all the while, together with the Marshal, in his office, in the grand jury room and elsewhere, the two officers, Miller and Barkdoll (R. 224, 228, 229, 230), suggesting to respondent that he make a statement and suggesting that the Marshal was a pretty big man and would be able to help him (respondent) if he would only give the statement (R. 230). Important also as fact and omitted from the government's brief is the discussion between the Marshal and respondent of McNeil Island Prison, the conditions and opportunities there to learn trades, the fact of which discussion, on cross examination, the Marshal first denied (R. 231, lines 26 to end of page), and then admitted.

## Argument

### FIRST QUESTION

At the commencement of the trial, respondent's counsel moved the court to dismiss the indictment on the grounds that the respondent had not been arrested or charged with the crime for which he was brought to trial, as provided by Rule 5 of the Federal Rules of Criminal Procedure (R. 43).

The respondent had been arrested on the 16th day of September by the authorities, suspected of an "assault with intent to commit rape upon a woman", one Christine Norton, and following several hours of questioning he admitted the assault and was taken before the United States Commissioner, where respondent was informed of the charges against him and advised of his rights. He was thereupon removed to the jail where he was interrogated intermittantly but at least for hours at a time from the 16th day of September to the 19th day of September, in connection with the death of the woman found in the park at Eighth and A Streets on the first day of August, 1949, and after four days, during which the interrogation occurred, the respondent signed the confession which was introduced into evidence, marked as Plaintiff's Exhibit No. 14 (R. 233), and during this time respondent was not legally charged with the murder for which he was subsequently indicted. nor was he at any time, prior to his confession, taken before a magistrate, nor was he ever informed of his constitutional rights by a magistrate or given the benefit of counsel in connection with said charge. He was indicted on the 12th day of October for murder in the first degree without benefit of previous appearance, or preliminary hearing and without benefit of counsel during such period of time. Following the indictment and on the 14th day of October, respondent, for the first time, was given the benefit of counsel. The

Federal Rules of Criminal Procedure, Rule No. 5, a and ~~provide for an appearance before the Commissioner, and so far as respondent can determine, the rule makes no exception.~~ It will, of course, be argued by the government, that because the respondent was already arrested and lawfully held in connection with another and completely independent crime there was no need to make a subsequent charge of the killing of the woman on the 31st day of July, but it would seem that the constitutional safeguards which were intended to apply in criminal procedures should not be disregarded simply because a man had been arrested and charged with some other crime. In the event that he was to be held primarily for a greater crime and particularly a capital crime where life might be forfeit and interrogated in connection with the same is more reason for taking the respondent before a magistrate and advising him that he was being held also in connection with the killing of the woman Agnes Showalter on July 31, and advised him that anything he might say would be used against him and given benefit of counsel in connection with that crime. This protection provided by F. B. C. P. Rule No. 5, seems to have been disregarded in connection with the matter in which respondent was tried and sentenced to death, and he contends that the failure to take him before a magistrate, to advise him of his rights, and to give him benefit of counsel was a denial of his constitutional rights and exposed him to the prolonged, secret, interrogation of the police authorities. It is revealing to note that the police officers succeeded in getting a statement from respondent admitting the assault on Christine Norton before taking him before the Commissioner on that charge even though he had previously been identified by Christine Norton as the man who assaulted her. Does it not seem probable that police officers would follow the same pattern of procedure in the *Showalter* case? The positive

identification of respondent by the witness Keith as the man with the woman who was found dead would have been more than sufficient to arrest respondent and charge him with the killing, had the officers not determined first to get a confession.

Respondent first arrived at the police station in the forenoon of the 16th day of September and between that time and Saturday, September 17, when U. S. Marshal Herring took charge of the interrogation process, City Police Officers had questioned respondent for several hours regarding the Showalter murder (R. 159-170-176-223-224). They were able to report to Marshal Herring that "it looked awful good" (R. 224), and it was Marshal Herring's assumption that respondent had been "talked to" (R. 224). There is nothing in the record to show just what form the interrogations by the City Police took during the 25 hours respondent was in their hands before Marshal Herring took over the examination, except that it began by respondent being shown a photograph of the dead body of Mrs. Showalter (R. 159-160). However, the testimony of the Marshal shows that from the moment he (Marshal Herring) assumed control of defendant, the psychology of the interrogation process was to be "the utmost courtesy at all times, as if a guest in my own home" (R. 221). "That (utmost courtesy according to the Marshal's testimony, was something that was stressed from the beginning" (R. 221). Marshal Herring further testified that everything respondent wanted for his comfort was furnished—cigarettes, water, a cushion for his chair, etc. Respondent was taken to a restaurant and fed, his meal being paid for "out of my (Marshal Herring's) own pocket" (R. 224). Respondent, after receiving these alleged favors and courtesies, stated to the Marshal, according to the Marshal's testimony, that he desired to talk to



the Marshal alone, out of the presence of City Police Officers Barkdoll and Miller (R. 221-229).

There is a conflict in the government's testimony as to why respondent was kept in the city jail instead of the Federal jail during the three day period of interrogation by the U. S. Marshal. Officer Barkdoll testified that "the only reason the boy (respondent) wasn't brought over to the Marshal's jail (Federal jail) was because they (Federal Officers) did not have adequate room for him." (R. 175). Yet shortly afterwards he (Barkdoll) testified that two "ladies" were removed from the city jail to the Federal jail so there would be room for respondent in the city jail. (R. 176). Marshal Herring admitted on cross-examination that two women prisoners were moved from the city jail over to the Federal jail, "so that he (respondent) could be alone by himself without being disturbed." (R. 227).

The issue in the present case, as urged by the government does not require reversal by this Court on certiorari. In writing the majority opinion below, Judge Healy established the issue as follows:

"What the Court has to decide is whether the circumstances outlined were such as to bring the case within the *spirit and intent* of Rule 5 and the holding of the McNabb decision, 318 U. S. 332, as further expounded in Upshaw v. U. S. 355 U. S. 410." (R. 228). In its specification of error to be urged, the government has carefully avoided mention of the spirit and intent of Rule 5, has ignored the spirit and intent of the McNabb and Upshaw decisions, has disregarded the extensive dicta set forth in the decisions by this Court in the above named cases, and has advanced the contention that the McNabb Rule hangs suspended in its entirety by the thread of strict construction of the government's selected phrase "illegal detention." (Emphasis ours).

The Court below decided first, that the circumstances outlined in this case bring it within the spirit and intent of Rule 5; and secondly, within the scope, spirit and intent of the McNabb decision as further expounded in *Upshaw v. U. S.*

The basic criterion for applying the McNabb rule is not *illegal detention*. This is made clear in *U. S. v. Mitchell* 322 U. S. 65. On p. 70 thereof, this Court speaking through Justice Frankfurter said "Our duty in shaping rules of evidence relates to the propriety of admitting evidence. This power is not to be used as an indirect mode of disciplining mis-conduct," (on the part of officers of the law). In the Mitchell case an illegal detention of eight days occurred following Mitchell's arrest and his prompt and spontaneous confession. The subsequent illegal detention was held not to retroactively change the circumstances under which he made the disclosure. (*U. S. v. Mitchell* 322 U. S. on p. 70).

In the instant case there was no prompt and spontaneous confession. It occurred only after four days of repeated interrogation. The record is incomplete as to what took place in the city jail between the time respondent was first brought before the City Police Officers by the C. I. D. Officer from Fort Richardson and twenty-five hours later when Marshal Herring took charge of the interrogation process, but the record does show that respondent, after that period, was susceptible to the psychological treatment and questioning of the U. S. Marshal. While on the one hand respondent did ultimately talk to Marshal Herring, on the other he declined to do so in the presence of the City Police Officers who had previously "questioned" him during the first twenty-five hours of his detention, (R. 221-229) at least five hours of which took place prior to his appearance before the U. S. Commissioner on the charge of assault

with intent to rape Christine Norton, or on any charge whatever.

Respondent, during his trial, desired to relate facts regarding his treatment at the hands of City Police Officers and the U. S. Marshal during the four day period of interrogation. He asked leave of the trial court to relate those facts, i. e., to testify in the absence of the jury as to the events and circumstances leading to the making of the confession. The trial court denied him this right and respondent's testimony was not heard. It should have been heard, and if it had been, the court then would have had the benefit of the defendant's testimony as to why defendant wished to avoid the City Police, and the reason why from out of his fear and reluctance he finally made a statement to the Marshal. The evidence here is not only consistent with, but indicates a strong possibility that this is a case of over-zealous officers working singly and in pairs in the quizzing of a suspect; to alternate from harshest kind of treatment to the other extreme of courtesy and kindness, with one officer playing the part of the relentless inquisitor and the other acting as the father-confessor to the accused. One abuses, the other appears to protect, sympathizes and promises, the object being to convince the suspect that only the presence of the gentle one restrains the other from conducting the inquisition in his own way.

The government states that the McNabb rule does not come into play unless the confession occurred during an illegal detention, and that the McNabb rule is not based upon constitutional considerations, but is a rule of evidence enunciated by this Court in "the exercise of its supervisory authority over the administration of criminal justice in the Federal Courts. It implements the policy of legislation (now embodied in Rule 5) requiring the prompt arraignment before a magistrate of a person arrested for crime."

While it may be true that the McNabb rule of itself is

not based upon constitutional considerations, it is manifest that were this Court to adopt the government's reasoning, thus holding in effect that in any case where a person is in legal custody charged with a crime, the requirements of Rule 5 are dispensed with as to another and separate crime, other constitutional considerations would arise accordingly, to-wit: denial of *due process of law* and *equal protection of the law*.

In the instant case, bail was set for respondent Carignan at the time of his appearance before the Commissioner on the earlier charge of assault with intent to rape Christine Norton. Unable to furnish bail respondent remained in jail in legal custody on that charge only. While under such legal detention he was removed from his cell on several occasions and subjected to questioning by the U. S. Marshal over a period of three days, during which time he was not under legal detention in connection with the Showalter murder. If he had been able to furnish bail then he would have been released immediately after his appearance on the assault-with-intent-to-rape charge and would have been under no detention whatever. To be then questioned by law enforcement officers (unless by his voluntary consent) re the Showalter murder, it would have been necessary to re-arrest him on the charge of murder, in which case the necessity of promptly taking him before a magistrate on the second charge cannot be denied.

Thus, if the government's argument were followed, where there are two or more separate crimes involved and an appearance is made upon only one of them, then the application of Rule 5 would turn upon the sole question of whether or not the accused is able to furnish bail. It would deny due process of law and equal protection of the law to that class of persons charged with crime or who are being interrogated in connection with other crimes and *who are*



unable to furnish bail, on the one charge upon which the appearance had occurred.

Surely it would be unjust, if not unconstitutional, to deny an accused the protection of Rule 5 merely because he is poor, friendless and unable to furnish bail. No surer way of fostering the evil implications of secret interrogation, condemned by the *McNabb* and *Upshaw* decisions, and increasing the use of "third degree" practices by police officers could be found than that which would follow if the government's theory were upheld.

Assuming for the purpose of this argument that the Government's interpretation of Rule 5 of the Federal Rules of Criminal Procedure is the correct one, and that this Court should decide that the spirit and intent of Rule 5 had been complied with in the subject case, thus the Court having established a case rule based on the government's theory, law enforcement officers could then use that precedent as an additional device in their attempts to get confessions from persons suspected of crimes. An interpretation of Rule 5 of that character would give the law enforcement officers, particularly police officers, an opportunity to cloak their inquisitorial activities under the color of law. In such event, law enforcement officers taking into custody a suspect or a person having been identified in some connection or other with criminal conduct or even on the barest suspicion could be taken immediately before a magistrate and charged with any sort of fictitious criminal conduct, for instance vagrancy, which is a common charge when holding suspects for interrogation, or even a traffic violation and thus having fulfilled the requirements of Rule 5, could with perfect freedom proceed to the real purpose for holding the suspect and the interrogation could then be pursued as relentlessly as though no rule existed, all subsequent police conduct could be clothed with the legality of having fulfilled the obligations of Rule 5. The possibilities of such

an interpretation as an aid to the circumvention of the McNabb Rule are unlimited and rather than protect suspects from the third degree and excessive interrogation would be a new device for the extraction of involuntary confessions and clothe all such interrogation with legality.

We, therefore, urge that the opinion of the Circuit Court of Appeals as rendered, with reference to the spirit and intent of Rule 5 is the only correct legal view and that no error was committed by the Appellant Court on that proposition.

### **Argument**

#### **SECOND QUESTION**

The error of the trial court, in refusing to permit respondent to take the witness stand, as a preliminary matter, in the absence of the jury, prior to the admission of the confession into evidence having been conceded as error by the government and its acknowledgment that a new trial would have to be held in any event, no argument is made on behalf of the Respondent to support the proposition set forth in the Second Question.

### **Argument**

#### **THIRD QUESTION**

Respondent contends that the purported confession, identified as plaintiff's exhibit No. 14 (R. 233), was not a voluntary confession but that it was procured by the United States Marshal, with the assistance of police officers, from the respondent under such circumstances as to make it inadmissible, and that in the admission of the statement for consideration by the jury, the trial court committed prejudicial error and denied to respondent the right of a fair trial.

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Respondent had been arrested in the forenoon of September 16 (R. 174) on the basis of a charge growing out of an alleged assault upon a woman by the name of Christine Norton, and within a short time following his arrest, he was submitted to an interrogation by the Anchorage City Police authorities which continued intermittently until he was turned over to the United States Marshal's office, on or about noon of the 17th of September and that the U. S. Marshal, Paul Herring, continued the interrogation through that afternoon, and to some extent on the following day and through the morning of a third day and obtained from respondent a signed statement on or about noon of the 19th. It is the contention of the government that this statement was a free and voluntary statement, however, it is the contention of the respondent that it was procured from him by prolonged and continuous interrogation, promises, inducements and psychological pressure. The cross examination of the witness, U. S. Marshal Herring will indicate throughout, that the statement was not a voluntary statement, that at no time did respondent appear willing to voluntarily confess the alleged crime, but that on the contrary the U. S. Marshal discussed with him certain working conditions and opportunities for learning trades existing at the Federal Prison at McNeil Island (R. 231) and informed the respondent that there had not been a hanging in Anchorage for a period of 27 years, (R. 230), and inferred that Officer Miller, who was assisting him (Herring) in the interrogation, could have made the promises which he (the Marshal) denied making, and that the U. S. Marshal exposed respondent to the strongest sort of psychological pressure, in taking him into the room where the Marshal displayed a number of religious plaques, telling respondent to look into the eyes of his Maker (a plaque with the head of Christ depicted thereon), and suggested that his Maker



might think more of him if he told the truth about this. (R: 231).

In the case of *Watts vs. Indiana* 338 U. S. 49, in an opinion written by Justice Frankfurter, the following language is found: "A confession by which life becomes forfeit must be the expression of free choice. A statement to be voluntary of course need not be volunteered, but if it is the product of sustained pressure by the police, it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary. To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process.

This is so because it violates the underlying principle in our enforcement of the criminal law. Ours is the accusatorial as opposed to the inquisitorial system. \* \* \* Under our system society carries the burden of proving its charge against the accused, not out of his own mouth. It must establish its case, not by interrogation of the accused, even under judicial safeguards, but by evidence independently secured through skillful investigation. The law will not suffer a prisoner to be made the deluded instrument of his own conviction. \* \* \*

In the case of *McNabb v. U. S.* 318 U. S. 322, the defendants were not taken promptly before a magistrate and the case revolves around the fact that prolonged questioning on the part of police officers occurred while the defendants were illegally restrained which facts differ from the present case in that Carignan was legally held on another charge

and had been taken before a magistrate on the other charge, but, however, all of the other factors in the McNabb case are present in this case.

It is necessary to point out that in the confession itself which was introduced into evidence and which is a part of this Record set forth in full, commencing (R. 233) respondent states:

"The next thing I remember I was walking down the street with a woman and I hit her in the nose or the face. I did not know this at the time, but it came back to me later when I was trying to piece together in my mind what had happened that night. The first thing I remember was me sitting and hitting a woman in the face with my fists."

In the entire statement, which was introduced into evidence over the objections of the respondent, there is no evidence of rape or intent to rape but only the stupid anger of a drunken man with his companion and the further statement of the defendant at the end of the confession:

"I believe I need medical attention and should receive it before I am allowed to go out into public."

after which appears the signature of respondent, and this last phrase would indicate, considering all the conversations which preceded it, that some promise had been given to respondent, otherwise there appears to be no necessity for making the statement that he needed medical attention before going out in public, at this stage of the interrogation. It appears that he thought or had been led to believe that he might go free, at least at some future date, and that his neck might not stretch. We further submit that there were sufficient admissions made by the witness Herring during his cross-examination to indicate that inducement

had been held forth to the defendant and that promises had been made to him, the circumstances of which have previously been cited, and that psychological pressure of the most intense sort had been used upon respondent, as has also previously been indicated, and it is therefore the contention of the respondent that the statement was not voluntary and should not have been admitted into evidence to be used as the most important if not the only positive evidence against respondent and that the Court was in error in admitting the statement into evidence.

## Argument

### FOURTH QUESTION

It is contended that the failure of the Court to instruct the jury on the question of the authenticity of the confession and the method by which the confession was procured, was error and that such an instruction should have been given. The case of *Cohen vs. U. S.* 291 Fed. 368, holds that if the judge feels the confession is admissible, the judge should give the legal tests for the jury to apply to the evidence as a matter of fact, as to whether the confession determines defendant's guilt or innocence. The trial court failed to give any instruction in connection with the confession and such failure was error of such nature as to prejudice the right of the defendant to a fair trial. The following cases support such view:

"In criminal prosecutions, the Court must correctly give the whole law of the case without any request or motion of the defendant to do so." *Skidmore vs. Commonwealth*, 223 S. W. 2nd, 739.

"Court must instruct jury on the law of the case, whether requested to do so or not, and instructions which, by omission of certain elements, have effect of withdrawing from

consideration of jury essential issue or element of the case, are erroneous." *Planck vs. State*, 38 N. W. 2nd, 790.

*Branm vs. U. S.* 168 U. S. 532

*Murphy vs. U. S.*, 285 Fed. 801

### Conclusion

The holding of the Court of Appeals that respondent's confession was inadmissible as not being within the spirit and intent of Rule 5, of the Federal Rules of Criminal Procedure and the holding of the McNabb decision as further expounded in the Upshaw case, is so clearly correct and such a legally proper application of the principles involved in Rule 5 and the McNabb and Upshaw cases, that for that reason and the further reasons appearing herein the judgment of the Appeal Court should be affirmed and the case be remanded to the District Court for a new trial as prayed for in the concluding paragraph of the government's brief.

Respectfully submitted,

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